In the Supreme Court of the United States

No. 76-86

McCLATCHY NEWSPAPERS, a corporation; ELEANOR McCLATCHY; C. K. McCLATCHY; BYRON CONKLIN; and CARLO BUA,

Petitioners,

vs.

WILLARD M. NOBLE and ETTA M. NOBLE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOSES LASKY
RICHARD HAAS
GEORGE A. CUMMING, JR.
111 Sutter Street
San Francisco, Calif. 94104
Telephone: (415) 434-0900
Attorneys for Petitioners

Of Counsel:
BROBECK, PHLEGER & HARRISON
111 Sutter Street
San Francisco, Calif. 94104
Telephone: (415) 434-0900

SORG PRINTING COMPANY OF CALIFORNIA, 340 FIRST STREET, SAN FRANCISCO 94105

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Willard M. Noble, et al.*, vs. *McClatchy Newspapers, et al.*, Nos. 72-2021 and 72-2042 below.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It appears in 1975-2 Trade Cases ¶ 60,594, and is set forth as Appendix A hereto.

The district court wrote no opinion. Certain of its rulings on

All emphasis in quotations has been added unless otherwise stated.

matters not involved in the petition are reported in 1972 Trade Cases ¶ 73,957.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. ¶ 1291. Its judgment was entered November 14, 1975. Respondents filed a timely petition for rehearing which was denied May 20, 1976. 1976-1 Trade Cases ¶ 60,905, Appendix B hereto.

The district court's jurisdiction was invoked under Section 4 of the Clayton Act, 15 U.S.C. ¶ 15, and 28 U.S.C. ¶ 1337.

QUESTIONS PRESENTED

1. Does the fact that a restraint of trade is of a type which is unreasonable *per se* dispense with the necessity that it be either in or affect interstate commerce in order that the Sherman Act apply? The court below held that it did.

2. Does the rule of *per se* illegality of territorial restrictions of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) apply to the local distribution of daily newspapers? The court below held that it did.

3. Has not a district court discretion to inform the jury in a private suit for violation of the Sherman Act that the court will treble the jury's award of actual damages? The court below held that it has not.

STATUTES INVOLVED

Title 28 U.S.C. ¶ 1337:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, as amended:

Section 1 (15 U.S.C. ¶ 1):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 730, as amended:

Section 4 (15 U.S.C. ¶ 15):

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE[1]

1. The Parties and the Facts.

The Sacramento Bee ["the *Bee*"] is a newspaper in Sacramento, California, there manufactured and published by petitioner McClatchy Newspapers ["McClatchy"]. Respondent Noble was a city newsstand distributor of the *Bee*, with primary responsibility for distribution of the *Bee* in an area (called "Newsstand 5") consisting of part of the City of Sacramento and of nearby suburban hamlets, all lying within 20 miles of downtown Sacramento, some 90 miles from the nearest state border.

Under his contract with McClatchy, Noble received full credit for unsold and returned papers. Customarily, Wednesday editions of the *Bee* contained numerous coupons by which a shopper could obtain a discount from grocers on advertised wares. Advertisers complained to the *Bee* about bulk traffic in coupons, which caused them to redeem coupons not used in *bona fide* purchases, and the

1. The facts are taken from the opinion below (App. A) and portions of the record reproduced in Appendix C.

Bee discovered that Noble had been submitting and taking credit for thousands of returns of Wednesday papers from which the food coupons had been removed. It also discovered that Noble was drawing far more papers on Wednesdays than he could be expected to sell legitimately. Noble conceded that he had been selling thousands of Wednesday papers to persons he knew were going to cut out the coupons and sell them, and that he himself had been selling coupons by the bag. (App. pp. 25-29). The *Bee* then told Noble and all its other distributors that trafficking in coupons would be cause for termination, and it entered into new contracts with them, expressly providing that a distributor would "not sell in bulk for purposes of abnormal use of said coupons" (App. p. 4, fn. 4). Noble's latest contract provided for cancellation by either party on 30 days' notice to the other. Later Noble complained to the *Bee* that this contract was illegal because it prevented him from selling coupons. Because of this and other complaints, the *Bee's* patience was exhausted, and it terminated the contract.

Noble at once filed this suit asserting violation of the Sherman Act.[2] He made four claims at the trial, for "exclusive dealing," for "monopolization", for "territorial restriction", and for denial of the right to sell "his business".

As respects the claim of "territorial restriction", his distributorship contract did not define the boundaries of "Newsstand 5" and did not forbid him from selling the *Bee* in other areas (App. pp. 24-25). The *Bee* refused to fix any boundaries, although Noble requested it to do so. It was testified on both sides that the contract created nothing but an area of primary responsibility (App. pp. 23, 25), which is plainly lawful. E.g., *Colorado Pump & Supply Co. v. Febco Inc.*, 472 F.2d 637 (10 Cir. 1973). Noble testified that the only restriction ever placed on him was that he was not to traffic illegally in merchandise

2. Noble's wife was a party to his contract and therefore a plaintiff. Petitioners Conklin and Bua were petitioners' employees.

coupons (App. p. 27), and that it was his understanding that he could sell wherever he could. (App. p. 24). But he based his claim of "territorial restriction" on the assertion that the *Bee* wished to split the area of "Newsstand 5", assigning part to another distributor, and that he was terminated because he refused to agree to the split. His counsel defined his "territorial restriction" claim thus:

> "plaintiffs * * * contend that they were injured by reason of defendants' alleged violation of Section 1 of the Sherman Act, in that plaintiffs' refusal to agree to defendants' territorial restrictions on their sale and distribution of the Sacramento Bee newspaper by splitting their dealership in half was a substantial factor in causing defendants to terminate them as distributors of the Sacramento Bee newspaper effective July 1, 1969." (App. p. 37)

The jury returned a verdict against Noble on this claim and the claims of "exclusive dealing" and "monopolization" and for him on the claim of denial of right to sell "his business", and judgment was entered accordingly.

2. The Decision of the Court Below.

On cross-appeals the court below affirmed the judgment as respects the claim of monopolization and reversed it with respect to the claim of denial of right to sell the business[3] and also with respect to the territorial restriction claim. This petition is confined to the "territorial restriction" claim. The court reasoned that the jury could "infer" a "tacit understanding" of a territorial restriction from the facts that McClatchy maintained maps showing the boundaries of areas for which distributors were responsible, that some of its distributors confined their efforts to the areas for which they were responsible, and that McClatchy

3. No error had been assigned with respect to the "exclusive dealing" claim, and the court below directed judgment to be entered for McClatchy on the denial of the right to sell.

had suggested to Noble that his area was too large for one man to handle effectively and that it should accordingly be split. Having thus reasoned that a jury *could* have inferred a tacit agreement, the court then reasoned that the jury may have done so but nevertheless failed to return a verdict for Noble because it found no effect on interstate commerce. Said it (App. 9):

> "Plaintiffs contend that the district court should have instructed the jury that an agreement to restrict the territory in which newsspapers purchased from McClatchy could be sold would have been a per se violation of section 1 of the Sherman Act, and it was therefore unnecessary for plaintiffs to prove an unreasonable restraint of interstate commerce would have resulted from such an agreement. Plaintiffs correctly state the law."

Again (App. 16):

> "Since under *Schwinn* the jury should have been instructed that such territorial restrictions are per se unreasonable, the judgment for defendants on the termination claim must be reversed and remanded for a new trial."

Thus the court sustained Noble's contention that the trial court had improperly declined to give an instruction reading as follows:

> "Because a vertically imposed restriction upon the resale of a product by a manufacturer after it has parted with ownership of it is a *per se* violation of Section 1 of the Sherman Act it is unnecessary for plaintiffs to prove that there has been a restraint of interstate trade and commerce as a result of such restriction—it is presumed." App. p. 40.

The court also held that the district court had erred in another respect. The district court had explained to the jury the purpose of the Clayton Act § 4 (15 U.S.C. § 15), instructed it that its function was to determine the actual amount of damages sustained, "no more, no less" and not to treble that amount or to add attorney fees, and had added (App. p. 38):

> ". . . it is the function and duty of the Court in the event that you should award damages to treble that amount in the judgment . . ."

The court below, by a 2 to 1 vote, held that it was error to inform the jury that its award would be trebled.

The court's decision, November 14, 1975, rests entirely on its interpretation of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), as establishing an intractable *per se* rule. Meanwhile, the whole court, *en banc*, had under consideration the scope of *Schwinn* in *GTE Sylvania Incorporated v. Continental T.V. Inc., et al.* in which a previous panel opinion by Judge Browning, who also wrote the opinion in this case, had been withdrawn. The petition for rehearing in this case, timely filed on December 3, 1975, was thus held under submission until *Sylvania* was decided *en banc* on April 9, 1976, by a split court, 7 to 4. (1976-1 Trade Cases ¶ 60,848) Judge Trask, one of the panel in this case, recused himself and did not participate in *Sylvania*, and Judge Browning there dissented.[4] The court *en banc* in *Sylvania* disapproved "any language in the *Noble* opinion that may be inconsistent with any of the majority's language in the present case." The panel in this case concluded that *Sylvania* did not require it to change its decision here, and it thereupon denied the petition for rehearing on May 20, 1976.

REASONS FOR GRANTING THE WRIT

The three questions stated above call for the writ because they involve fundamental antitrust questions. On the first, the decision below is a surprising departure from the law settled by this Court so recently as *Gulf Oil Corporation v. Copp Paving Co.*, 419 U.S. 186 (1974). On the second, there is conflict among the circuits and the courts of appeal are calling for guidance. On the third there is conflict among the circuits.

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4. The third judge of the panel in the instant case, Judge Gray, is a district judge and therefore did not participate in *Sylvania*.

What the court below did was to hold that an agreement imposing territorial restrictions could be inferred from facts universally present in local newspaper distribution everywhere in the nation, then held that the inferred restriction was an unreasonable restraint *per se*, and then that no presence in or affect on interstate commerce is necessary to bring such a restraint under the Sherman Act. By those three steps, every local newspaper in the country becomes a likely antitrust defendant, with no way to protect itself from potential punitive liability other than to replace independent carriers with company employees.[5] We think the reasoning which infers a tacit agreement of territorial restriction from the facts is flawed. But, accepting it for purposes of this petition, the decision is in grave error, and even more so if such an inference is permissible, and, by its expansion of federal jurisdiction to purely local matters, subjects every newspaper to liability because of the unalterable facts of the business.

I. That a Restraint of Trade Is of the per se Type Does Not Dispense With the Necessity That It Be Either in or Affect Interstate Commerce.

It has long been elementary that the Sherman Act is not implicated unless two elements conjoin:

(1) There is a restraint of trade which is unreasonable either because

(a) it is unreasonable in fact or

(b) it is deemed unreasonable *per se*, and

5. As Mr. Justice Douglas predicted in *Standard Oil Company v. United States*, 337 U.S. 293, 319 (1949), statutes designed to preserve small merchants can suffer interpretations foretelling their demise. This is already the present trend in the newspaper business, where carriers are being replaced by employees. E.g., *Lamarca v. The Miami Herald Publishing Co.*, 395 F.Supp. 324 (S.D. Fla. 1975); *Millcarek v. Miami Herald Publishing Co.*, 388 F.Supp. 1002 (S.D. Fla. 1975); *McGuire v. The Times Mirror Co.*, 405 F.Supp. 57 (C.D. Cal. 1975).

(2) the restraint is either in or has a substantial adverse effect on interstate commerce. *Gulf Oil Corp. v. Copp Paving Co., supra; United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975); *Hospital Building Co. v. Trustees of Rex Hospital*, ... U.S. ....., 1976-1 Trade Cases ¶ 60,885 May 24, 1976.

But the decision below holds that, if the restraint is unreasonable because it is of a type deemed unreasonable *per se*, the second requirement—that the restraint be in or affect interstate commerce—vanishes. This assigns to a *per se* situation a double office, the first, to produce unreasonableness of the restraint, the second, to usurp the requirement of commerce. This rewrites the basic formula to read that the Sherman Act is implicated (1) if there is a restraint of trade which is unreasonable *per se*, regardless of commerce or (2) if the restraint of trade, though not unreasonable *per se*, is unreasonable in fact, and, in addition, is either in or has a substantial adverse effect on interstate commerce.

This revision of the law is a heresy, which should be rooted out before it spreads.

While McClatchy may be engaged in interstate commerce because newsprint, ink, and advertising reach it across state lines, this case has nothing to do with any restriction on that commerce. The trade here involved is the purely local distribution in the environs of Sacramento of a newspaper printed there, all in California. The cancellation of Noble's contract had no effect on interstate commerce. It did not result in the importation of less ink or newsprint or anything else into California or in fewer copies of the *Bee* leaving California. It did not even affect the distribution of the *Bee* in "Newsstand 5", for that distribution continued unabated albeit in other hands than Noble's.

The court below did not hold that the activities involved were in interstate commerce or that interstate commerce was affected, and could not, for such a holding would have foundered

for want of an anchor "in the economic realities of interstate markets, the intensely practical concerns that underlie the purposes of the antitrust laws." *Gulf Oil Corp. v. Copp Paving Co., supra,* 419 U.S. 198. The court below merely held that no restraint of interstate commerce was necessary or, what was the same thing, that effect on interstate commerce was conclusively presumed because of the supposed *per se* nature of the restraint.

This is not warranted by *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967). It is a radical departure from anything ever previously decided. So late as *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), the classic *per se* case because it was a price-fixing case, the Court framed the issues for decision, saying (421 U.S. at 780):

> "Our inquiry can be divided into four steps: did respondents engage in price fixing? *If so,* are their activities in interstate commerce or do they *affect interstate commerce?*"

After answering the first question affirmatively, the Court was at pains to demonstrate that the Bar's price fixing scheme had in fact substantially and adversely affected interstate commerce (421 U.S. at 783-785), and concluded (p. 785):

> ". . . Of course, there may be legal services that involve interstate commerce in other fashions, *just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act.*"

II. Schwinn's per se Rule of Territorial Restriction Should Not Be Applied to the Distribution of Daily Newspapers.

The ruling below about interstate commerce rests on a conclusion that the supposed restraint was unreasonable *per se,* and this in turn was rested by the court on *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967). The court stopped its ears to realities and to the necessities of newspaper distribution because it viewed *Schwinn* as compelling it to do so. To all the evidence about the

need for orderly distribution in the newspaper business, the court below had a one-sentence reply: "In any event the argument that need for speedy delivery of perishable products justifies an exception to the *Schwinn per se* rule has been rejected whenever raised." (App. p. 12). But it has not, and ought not to be.

The meaning and reach of *Schwinn* has been a constant and vexing question. Only recently the Ninth Circuit, on rehearing *en banc* in *GTE Sylvania, Inc. v. Continental T.V., Inc.,* ..... F.2d ....., 1976-1 Trade Cases ¶ 60,848, split 7 to 4 about what *Schwinn* means and requires, and held that, in the circumstances of that case, *Schwinn* did not mandate a *per se rule.* A little earlier, in *Tripoli Co. v. Wella Corp.,* 425 F.2d 932 (1970, *en banc*), cert. denied, 400 U.S. 831, the Third Circuit also rejected the view that *Schwinn* laid down a cast iron *per se* rule. In *Tripoli* a distributor of potentially dangerous hair preparations was terminated because it refused to limit its resales to professional beauticians. A mechanical *Schwinn* argument was rejected, the court saying (425 F.2d at 936):

> "That case [*Schwinn*] does not, as plaintiff proposes, establish as a per se violation every attempt by a manufacturer to restrict the persons to whom a wholesaler may resell any product whatsoever, title to which has left the manufacturer. Rather, *Schwinn* must be read, as must all antitrust cases in its factual context. That context is a restraint on the territories in which and the retailers to whom a wholesale purchaser may resell a bicycle, a product so simple to use that most ultimate consumers are children."

Tripoli and the decision below are in direct conflict.

Similarly, in *Copper Liquors v. Adolph Coors Co.,* 506 F.2d 934 (1975), the Fifth Circuit observed that the circumstances of the business before it presented a "tempting invitation" to adopt the rule of reason analysis of *Tripoli v. Wella Corp., supra,* but reluctantly declined because of the price fixing aspects of the case.

In *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), the Commission had expressly declined to invoke what it called the "technical formula" of *Schwinn*, and instead evaluated the substance of the alleged restriction in the context of the particular facts of the industry. (405 U.S. at 247, n. 6)[6]

Schwinn itself recognizes that "confinement of distribution . . . may be permissible in an appropriate and impelling competitive setting." 388 U.S. at 379. And despite passages in *Schwinn* that appear strait and encompassing, it is elementary law that every opinion must be read in light of the facts of the case, *German Alliance Ins. Co. v. Home Water Co.*, 226 U.S. 221, 234 (1912) and no more so than in Sherman Act cases. As said in *Maple Flooring Ass'n. v. United States*, 268 U.S. 563, 579 (1925):

> "This Court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts . . ."

So it must be with the *Schwinn* decision. In *GTE Sylvania, Inc. v. Continental TV, supra,* ..... F.2d ....., 1976-1 Trade Cases ¶ 60,848, the court below, in interpreting and applying *Schwinn*, made that very observation and quoted the passage from the *Maple Flooring* case. In *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), the Court admonished (pp. 132-3):

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of the cases not before the Court. *General expressions transposed to other facts* are often misleading."

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6. Although the Commission was proceeding under Section 5 of the Trade Commission Act, 15 U.S.C. ¶ 45, its approach was precisely the rule of reason analysis rejected below.

If there ever was a case where the realities of the business—the facts of life—should prevail over the doctrinaire, this is it. And bearing in mind the importance to a democracy of unimpeded newspaper circulation, nowhere is a doctrinaire application of law less warranted. A rule of law that the distribution of daily newspapers is conclusively governed by ancient rules respecting the passage of "title" and "restraints on alienation" applicable to the distribution of ordinary commodities is, to borrow a phrase of Mr. Justice Frankfurter, "mechanical jurisprudence in its most glittering form." *Bindczyck v. Finucane*, 342 U.S. 76, 85 (1951). Technically "title" may have passed to Noble, but as to any unsold papers he had "title" for but a few hours, because they were returnable to McClatchy for full credit. The property to which a "title" adheres, an afternoon daily newspaper, comes into existence about 2:00 P.M. and ceases to exist, as a salable item, shortly after the sun goes down.

Only one case cited in the opinion below had anything to do with daily newspapers, *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). Decided eighteen months after *Schwinn*, this Court in *Albrecht* carefully avoided blanket *per se* condemnation of territorial restrictions in the newspaper business, confining its remarks on that subject to the facts of the case, where the territorial restrictions were part and parcel of a larger and patently unlawful price-fixing scheme. (390 U.S. at 154). No greater friend of antitrust enforcement has sat on the Court than Mr. Justice Douglas, and, concurring in *Albrecht*, he called attention to the significance of the price-fixing element, thus (390 U.S. at 154-156):

> "This is a rule of reason case stemming from *Standard Oil Co. v. United States*, 221 U.S. 1, 62. Whether an exclusive territorial franchise in a vertical arrangement is *per se* unreasonable under the antitrust laws is a much mooted question. A fixing of prices for resale is conspicuously unreasonable, because of the great leverage that price has over the market. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221.

> The Court quite properly refuses to say whether in the newspaper distribution business an exclusive territorial franchise is illegal.
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> * * *
>
> "Under our decisions, the legality of exclusive territorial franchises in the newspaper distribution business would have to be tried as a factual issue, and that was not done here."

The local distribution of daily newspapers bears no resemblance whatsoever to the national distribution of bicycles or any other, ordinary goods. To sell bicycles it is not necessary that tens of thousands of bicycles be manually and individually delivered, seven days a week, by hundreds of different persons, mostly school children, to thousands of different specific locations, every evening or morning at a precise time. But without such distribution there could be no daily newspapers. To sell bicycles it is not necessary that a bicycle have been manufactured only a few hours before its final sale. But a daily newspaper is the most perishable commodity known. It cannot be stored, remodeled or refurbished; in a matter of hours it is scrap. Bicycles are not delivered by a veritable battalion of persons carrying them about, block by block. An adult, or boy or girl, can carry only so many papers in the short time available. Bicycles are also not delivered by boys and girls who throw them on a subscriber's roof or into his shrubbery, or who sometimes do not throw them at all. But when the paper is missing, the subscriber calls the publisher, and *the publisher must know who is responsible for each delivery* so that readers are not lost. To sell bicyces it is not necessary that the bicycle carry advertising, which must reach the purchaser at a particular time. But such advertising and its timely delivery are essential to a newspaper's existence.

Without exception, the testimony of every witness, including both Noble and his expert, recognized that the distribution of newspapers requires *some* form of ordered, territorial system.

Noble himself desired specific, precise boundaries and unsuccessfully complained to the *Bee* to obtain them. (App. pp. 24-25) Noble's expert, Rothman, with fifty-five years' circulation experience at five different newspapers, testified that it is a common practice, all over the United States, to have carrier boys and girls, as well as wholesale distributors, assigned to routes or areas. The reasons are always the same, *viz.*, the time element, and the necessity of an orderly system of distribution. Boy or man, "he had just so many things that he could do and so many miles that he could cover and so many places he could go." Some orderly method of distribution is required. Every distributor must know where he is to go, and the publisher must know who is responsible for the delivery of each individual paper. (App. pp. 30-35).

In every newspaper office in the United States, there is and must be a map, route list or similar record which identifies the areas, routes or customers for which a particular distributor or carrier is responsible. In every newspaper in the United States still employing the services of independent carriers, there are carriers who limit their distribution to the routes for which they are responsible, if for no other reason than that school adjourns at 3:00 P.M. and the youngster must have done his route and be washed and ready for dinner by 6:00 P.M. And in every newspaper in the United States there are repeated discussions concerning the size of areas which can be properly serviced by a single individual.

The opinion of the Court below thought it surprising that McClatchy claimed that an orderly system of distribution is essential while submitting that it did not impose territorial restrictions on its distributors (App. p. 12). The point is that if the law permits a jury to draw an inference of territorial restrictions from facts essential to orderly distribution, like areas of primary responsibility and route lists, where in fact no restriction is specified, then a *per se* rule is particularly doctrinaire and indefensible.

No case cited by the court below supports it. Some involved horizontal restrictions,[7] others price fixing, as already noted. In the end, the decision below rests on a rigid reading of *Schwinn,* a reading rejected by the court below sitting *en banc* in the *Sylvania* case, by the Third Circuit in *Williams v. Independent News Co.,* 485 F.2d 1099 (1973), by the Third Circuit *en banc* in *Tripoli v. Wella Corp.,* 425 F.2d 932, and by the Federal Trade Commission in the *Sperry & Hutchinson* case.

Only this Court can put an end to the vexing differences about what *Schwinn* commands. Even judges who have been unable to read *Schwinn*'s words other than rigidly have raised their voices. For example, Judge Duniway, dissenting in the *Sylvania* case, said (1976-1 Trade Cases, at p. 68,742):

> "I dissent solely on the ground that . . . Schwinn . . . is squarely in point . . . . I cannot, however, refrain from making one small observation. I am puzzled by the notion that because courts are not very well equipped to decide between conflicting notions of economic policy, they should pick one side of such an argument and erect it into a rule of per se illegality."

Just this month, in *Cantor v. Detroit Edison Co.,* ..... U.S. ..... No. 75-122 (July 6, 1976), the plurality opinion quotes approvingly from *Appalachian Coals, Inc. v. U.S.,* 288 U.S. 344, 360 (1933):

> "The restrictions the [Sherman] Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis."

7. *United States v. Topco Associates,* 405 U.S. 596 (1972), cited at App. pp. 9-10, 12, involved a *horizontal* division of territories, and thus rested upon quite different principles settled long before *Schwinn.* See 405 U.S. at 608-609. The same is true of *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894 (5 Cir. 1973), cited at App. B, p. 14.

In *Fairfield County Beverage Distributors v. Narragansett Brewing Co.,* 378 F. Supp. 376 (D.Conn. 1974) (App. p. 11), the court was prepared to evaluate the restrictions by application of rule of reason but then concluded that Connecticut's liquor laws placed defendant's conduct beyond the reach of the Sherman Act. 378 F.Supp. at 379-380.

III. A Trial Court Should Be Free, in the Exercise of a Sound Discretion, to Inform the Jury That the Award, Which Is to Be Measured by Actual Damages, Will Be Trebled by the Court.

May the trial judge inform the jury, in an action for damages under the antitrust laws, that its award of actual damages will be trebled? On this question, on which there is conflict among the circuits, everything that can possibly be said on either side can be summarized tersely.

On a plaintiff's side, it is argued that if the trial judge tells the jury that its award will be trebled, the jury will return a verdict for less than actual damages in recoil from the prospect of an enlarged judgment, even though, as here, it is instructed that its award must be for actual damages. Therefore, it is urged, the jury will defeat the beneficent purposes of the statute. That is the view of the court beow, and of the Fifth and Tenth Circuits. *Pollock & Riley, Inc. v. Pearl Brewing Co.,* 498 F.2d 1240 (5 Cir. 1974); *Semke v. Enid Automobile Dealers' Ass'n.,* 456 F.2d 1361 (10 Cir. 1972).

On the defendant's side, it is argued that jurors do not live in a vacuum, that they have heard that antitrust cases involve treble damages, and that, unless advised that the function of trebling is for the court, they will return a verdict for treble what they determine to be actual damages, so that, after trebling by the court, the judgment will be for ninefold actual damages. Therefore it is necessary that the jury be fully instructed on the respective func-

tions of judge and jury. That is the view of the Second Circuit, *Bordanaro Bros. Theaters, Inc. v. Paramount Pictures, Inc.*, 203 F.2d 676 (1953), and of a multitude of district courts who sit on the firing line and are in touch with day-to-day actualities.[8] This has been called "the overwhelming weight of authority and, it is believed, the better view". Timberlake, Federal Treble Damage Antitrust Actions ¶ 19.06, p. 280.

The resolution of the conflict must lie in a basic premise that *has to be accepted* if the jury system is to survive. The jury system is intolerable unless the law makes the basic non-traversable assumption that the jurors will honestly and conscientiously discharge their duty and follow the law as it is told to them by the court. As said in *Delli Paoli v. United States*, 352 U.S. 232, 242 (1957):

> "... Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice."

The rule of the court below assumes that the jury will defy the law, although told what it is, and substitute its own views of public policy for that of Congress. A jury cannot follow the law if any part of the pertinent law is concealed from it. Just as a witness must tell, not only the truth, but the whole truth, just as famous 10(b)(5) recognizes that a statement true as far as it goes may still mislead unless something more is added, the jury is entitled

8. See e.g., *Cape Cod Food Products v. National Cranberry Ass'n.*, 119 F.Supp. 900, 911 (D.Mass. 1954); *Viking Theater Corp., v. Paramount Film Distributing Corp.*, 1961 Trade Cases ¶ 70,051 (E.D.Pa., citing over a dozen unreported decisions to the same effect); *Village Theatres, Inc. v. Paramount*, (D.Utah 1957, unreported, court's instruction quoted in Timberlake, *supra*, p. 282).

to know all the pertinent law. Thus an experienced trial judge, Judge Gray sitting below by designation, dissenting on this issue, said (App. pp. 18-19):

> "... I think that the trial court should 'level' with the jury and make sure that the members thereof understand the respective responsibilities of jury and court with respect to damages, just as the trial judge in this case did.
>
> "Jurors, like other citizens, are entitled to know what the law is, even with respect to damages in antitrust cases; presumably, many of the people who serve on juries have some awareness in these matters. If no explanation is given as to who does the multiplying by three, the jury might well assume that the responsibility is theirs and thus do it without anyone becoming aware that the "damages" have already been trebled. A judge fixes damages in an antitrust case in full knowledge that the amount will be tripled; I see no valid reason why we should try to conceal from a jury the ultimate effect of their verdict."

In earlier days, when private treble damage actions were relatively rare, a judge might have rationally supposed that jurors were unaware of the tripling feature of the statute. That time has long passed. Today antitrust cases are commonplace.[9] Many involve famous athletes, and are regularly and widely reported in the news media and the sports pages.[10] Current facts, both shown by the record here and judicially known to this Court, demonstrate that the only realistic view is that "Whether or not the jury is

9. The year 1962 saw the filing of 1,739 treble damage actions in the electric industry cases alone. Other filings amounted to 283 in 1963, and increased to 536 filings in 1967. See *National Institute on Treble Damage Litigation*, 38 Antitrust L.J. 4-5 (1968). And as of June 30, 1970, there were 344 private antitrust cases pending in the Northern District of California alone. *Annual Report of the Director, Administrative Office of the United States Courts* for the fiscal year ended June 30, 1970.

10. E.g., *Flood v. Kuhn*, 407 U.S. 258 (1972); *Haywood v. National Basketball Ass'n.*, 401 U.S. 1204 (1971); *Kapp v. National Football League*, 390 F.Supp. 73 (N.D.Cal. 1974); *Blalock v. Ladies Professional Golf Ass'n.*, 359 F.Supp. 1260 (N.D.Ga. 1972).

explicitly informed of the [treble damage] provision's existence, it is unreasonable to assume that they will not learn of it anyway during trial." *Note,* 80 Harv.L.Rev. 1566, 1569 (1967).

San Francisco, where this case was tried, has over the years been the scene of many antitrust cases. When this case was being tried, the electric industry antitrust cases were again daily fare in the news, for then San Francisco Mayor Alioto was on trial in the State of Washington over fees received in that litigation. Scarcely three weeks before the jury was selected in this case, the following appeared in the *San Francisco Chronicle:*

"TESTIMONY BEGINS IN
ALIOTO TRIAL

> "Alioto, O'Connell and Faler are being sued for recovery of $2.3 million in legal fees paid Alioto in the mid-'60s for prosecuting a series of *treble damage antitrust suits* against large electrical manufacturers." (App. pp. 35-36)

Just two weeks before jury selection, the San Francisco *Chronicle* had reported:

"SUIT FILED IN TRADING
STAMP WAR

> "A $10 billion antitrust suit, charging racial slurs, was filed in federal court here yesterday . . .
>
> "The suit asks for $160 million actual damages from each defendant which, *when trebled,* is $10,080,000,000. *In antitrust suits, if damages are proved, the damages are automatically trebled.*" (App. pp. 36-37)

In his opening statement, Nobel's counsel reminded the jury of newspaper accounts of antitrust cases. App. p. 22. At that very moment another jury in the same courthouse was returning a verdict in *Ford Wholesale Co. v. Fibreboard Paper Products Co.,* N.D.Cal. No. 45977-WJS, and Noble's counsel thus invited the jury to read the *San Francisco Chronicle's next morning's* report of that verdict:

"$300,000 AWARD IN
TRUST SUIT

> "A jury yesterday awarded a judgment of $300,000 to Ford Wholesale Co., Inc., San Jose, in its *treble-damage* trade restraint suit against Fibreboard Paper Products Co." (App. p. 36).

In this case the trial judge clearly explained to the jury the public purpose of the private antitrust suit, instructing (App. pp. 38-39).

> "The private cause of action was intended by Congress to serve the dual purpose of permitting those injured by violations of the antitrust laws to recover damages and to aid the United States Government in enforcing the antitrust laws.
>
> In authorizing private remedies for persons injured by infractions of the antitrust laws, Congress intended to provide not only for private redress in damages, but also to secure more effective enforcement of antitrust legislation.
>
> The private antitrust action is a sanction granted to private—to a private plaintiff as distinct from the United States Government because of the public interest. It is clear that Congress imposed the penalty of treble damages on violators of the antitrust laws in order to deter other violators of the antitrust laws and to supply an ancillary force of private attorneys general to supplement the United States Department of Justice Antitrust Division in the enforcement of the Federal antitrust laws."

The court also instructed that "your function is to determine as accurately as you can from the evidence which you have heard the amount of compensation which will actually compensate the plaintiffs for any injury to their business or property, no more, no less." App. p. 39. To deny the court the power then to tell the jury that the court would do the trebling, for fear that the jury would flout the law, does a disservice to the jury system.

We need not go so far as to urge that an antitrust defendant is automatically entitled to such an instruction. But the trial court, whose first-hand familiarity with all the circumstances can never be fully imparted in a cold appellate record, should not be stripped of all discretion in the matter. Certainly, when a plaintiff's counsel invites the jurors' attention to newspaper accounts, a trial judge is warranted in assuring that the jury receives the law from the court and not from the newspapers, just as judges must assure that criminal defendants are tried on evidence presented in open court and not in the newspapers. E.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965).

CONCLUSION

We respectfully submit that the petition should be granted.
Dated: San Francisco, California, July 20, 1976.

MOSES LASKY
RICHARD HAAS
GEORGE A. CUMMING, JR.
Attorneys for Petitioners

[Appendices follow]

Appendix A

United States Court of Appeals
for the Ninth Circuit

WILLARD M. NOBLE and ETTA M. NOBLE, *Plaintiffs-Appellees,* vs. MCCLATCHY NEWSPAPERS, a corporation, et al., *Defendants-Appellants.*	No. 72-2021
WILLARD M. NOBLE and ETTA M. NOBLE, *Plaintiffs-Appellants,* vs. MCCLATCHY NEWSPAPERS, a corporation, et al., *Defendants-Appellees.*	No. 72-2042

OPINION

[November 14, 1975]

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING and TRASK, Circuit Judges,
and GRAY,* District Judge

BROWNING, Circuit Judge:

Willard Noble and his wife, Etta, were distributors of the Sacramento Bee newspaper. Their distributorship was cancelled. They brought this private antitrust action against McClatchy Newspapers, publisher of the Bee, and seven individuals.[1]

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*Honorable William P. Gray, United States District Judge, Central District of California, sitting by designation.

1. The individual defendants are three officers of the corporation, two circulation department employees, and two persons who acquired plaintiffs' route following termination of plaintiffs' distributorship.

Three claims are at issue on these appeals: First, that defendants violated section 1 of the Sherman Act to plaintiffs' injury by terminating plaintiffs' distributorship; second, assuming the lawfulness of the termination of plaintiffs' distributorship, that defendants violated section 1 of the Sherman Act to plaintiffs' injury by preventing plaintiffs from selling their distributorship after termination; and third, that defendants violated section 2 of the Sherman Act to plaintiffs' injury by monopolizing the publication of daily newspapers of general circulation in the relevant market.

The case was tried to a jury. The jury returned a verdict for defendants on claim one (the termination claim) and three (the monopolization claim), and for plaintiffs on claim two (the sale-of-business claim). Judgment was entered in favor of plaintiffs on the sale-of-business claim in the amount of $63,333.04—$15,000 in damages, trebled, costs and attorneys' fees of $18,333.04.

Defendants appeal the denial of their motion for judgment n.o.v. or a new trial on the sale-of-business claim. Plaintiffs appeal the denial of injunctive relief with respect to this claim. They also urge that errors in jury instructions and rulings on evidence infect the judgment as to the termination and monopolization claims, and seek a new trial on these claims if defendants succeed in their appeal of the judgment as to the sale-of-business claim.

BACKGROUND FACTS

Willard Noble was an independent city newsstand distributor for the Sacramento Bee from October 1, 1960, to July 1, 1969, under three contracts with McClatchy Newspapers. Etta Noble was a party to the third of these contracts, entered on April 18, 1969.

Under the distributorship contracts, plaintiffs were responsible for sale and distribution of the Bee in an area referred to as "Newsstand #5," encompassing a portion of the City of Sacramento and its suburbs. Plaintiffs purchased daily and Sunday copies of the Bee from McClatchy Newspapers at wholesale and resold them from newspaper vending racks and to retail outlets. Unsold papers could be returned at cost, but plaintiffs assumed full responsibility for copies lost through theft or other causes.

Paragraph nine of the distributorship contracts provided that if plaintiffs decided to transfer their route they would give McClatchy Newspapers sixty days' notice, that McClatchy had "the right to determine the qualifications of the proposed new distributor," and that McClatchy's consent to transfer "shall be required, and will not be unreasonably withheld."[2] Paragraph eleven provided that the contract "may be cancelled by either party at any time upon thirty days prior written notice to the other party."

By letter dated May 27, 1969, McClatchy Newspapers cancelled plaintiffs' distributorship effective July 1, 1969. The reason for this action was disputed. Plaintiffs contended their refusal to agree to split their distributorship territory "was a substantial factor in causing [McClatchy] to terminate them." Defendants contended that the distributorship was terminated because of Willard Noble's "continued stream of complaints" regarding such matters as late delivery of papers and McClatchy's refusal to compensate distributors for theft losses."[3]

---

2. Paragraph nine was added to the city newsstand distributors' contracts in the spring of 1969, at the request of the distributors. Defendant Byron Conklin, circulation manager of the Bee, testified there never had been any "prohibition against selling a distributorship." Wentworth Kilgen, associate house counsel for McClatchy, testified that he approved the addition of paragraph nine to the contract because it was the "natural consequence" of the law "that a person can sell any asset that he has unless there is some restriction preventing him from doing so." He also stated "there was nothing to prevent the transfer of the distributorship under the previous contract, because there was no restriction against it."

3. Defendants did not question Noble's competency as a distributor. Defendant Conklin testified that Noble was "very circulation conscious," that he "worked very hard to service his dealership," and that he "did

According to defendants, the difficulties with Noble came to a head during a telephone conversation between Noble and defendant Carlo Bua, assistant circulation manager. Bua testified that the conversation "started as a griping session" during which Noble complained "about the thefts of his papers, the late papers, he couldn't get qualified help, and so forth and so on." Noble questioned whether the Bee was properly accounting for theft losses in reporting its circulation to the Audit Bureau of Circulation, an independent organization whose audits of publishers' circulation statements are heavily relied upon by advertisers. Noble also said he believed the distributorship contract was illegal insofar as it forbade bulk sales of unsold copies of editions that contained advertising discount coupons.[4] Bua "mentioned" that the solution to Noble's problems would be to split his distributorship. Noble replied that "under no circumstances would he want to split his distributorship."[5] Bua reported the substance of the conversation to defendant Byron Conklin, the circulation manager.

a hell of a job" for the Bee. Defendant Carlo Bua, assistant circulation manager, testified that Noble was a "knowledgeable, experienced newspaper distributor." During Noble's nine years of service circulation of the Bee in Newsstand 5 increased approximately fourfold.

4. The bulk sale problem concerned McClatchy because of complaints by advertisers that unusually high percentages of coupons were being returned for redemption, including many they believed had not been used to purchase the advertised products. Noble admitted that in late 1967 or early 1968, he made bulk sales of about 5,000 copies of the Bee containing discount coupons, but claimed these sales were made with Conklin's knowledge and approval to reduce theft losses. Conklin denied this. Noble testified that in May 1968 Bua admonished him to stop selling in bulk, and he complied. Conklin subsequently informed the city newsstand distributors that bulk sales of editions with coupons would be cause for termination. Still later, in April 1969, distributor contracts were revised to provide that "sale of editions containing advertising coupons will not exceed the normal demand for single copy sales of such editions and that [the distributors] will not sell in bulk for purposes of abnormal use of said coupons."

5. Bua and Conklin admitted they had "suggested" to Noble on a number of prior occasions that he split his territory. They testified these suggestions were merely "constructive advice" as to how Noble might eliminate the problems he complained of.

Conklin testified that Noble's complaints were "the straw that broke the camel's back"; his "patience was exhausted." He consulted his supervisor, O. J. Brightwell, business manager of the Bee, explaining that "his department was no longer able to get along with Mr. Noble," and recommending that he be terminated. Brightwell agreed. The cancellation letter was sent the following day.

A few days later Conklin told Bua, "now is the best time to split Newsstand 5." He instructed Bua "to find a satisfactory boundary line." Noble asked for reinstatement. Conklin refused. Noble asked if he could sell his distributorship. Conklin said "he had nothing to sell," and in any event McClatchy had plans to split the distributorship. Noble asked that he be allowed to "retain a portion of [his] dealership if it was split." Conklin refused.

Bua decided on a two-part division of Newsstand 5. Conklin initiated discussions with defendant Gary Downing, an employee of the Bee's circulation department, about becoming a distributor in a portion of Newsstand 5. Defendant James Gallagher, the Bee distributor for Newsstand 2, requested that he be considered for the remaining portion. Downing and Gallagher entered into distributorship contracts for the divided portions of Newsstand 5, effective July 1, 1969. With the permission of McClatchy, Gallagher sold his business in Newsstand 2 for $6,000.

DEFENDANTS' APPEAL

The sole issue on defendants' appeal is whether the district court erred in denying their motion for judgment n.o.v. or new

Robert Gilliland, plaintiffs' expert on newspaper circulation practices, testified it was "in the best interests of management to keep [dealership] areas down to limited size," and if a dealer refused to split, management would "have to . . . take legal action to split the area or, quite frankly, cancel the man who won't split it."

trial on plaintiffs' sale-of-business claim.[6] We agree with defendants that the motion should have been granted.

Instructions given by the district court on the sale-of-business claim are reproduced in the margin.[7] According to these instructions the claim rested entirely upon the unlawfulness of defendants' refusal to authorize plaintiffs to sell Newsstand 5. For the purpose of this claim, lawfulness of the termination was to be

6. Plaintiffs argue that defendants waived their right to raise this issue by failing to raise it below. However, defendants challenged the sufficiency of the evidence on the sale-of-business claim in their trial brief, in their proposed instructions, in their motion for directed verdict on the sale-of-business claim, and in their brief in support of the motion for judgment n.o.v. or new trial on this claim.

7. The relevant instructions, requested by plaintiffs, read:

> The [second] claim in this case is that the plaintiffs . . . contend that they were injured by reason of defendants' alleged violation of Section 1 of the Sherman Act, in that defendants refused to permit plaintiffs to sell and transfer their newspaper distribution business known as Newsstand No. 5, as plaintiffs contend that they were entitled to do so pursuant to their ownership of said business.
>
> I will refer to this claim as the sale of business claim.
>
> This sale of business claim is a different claim from the territorial claim which I have just instructed you on. This sale of business claim is made by both plaintiffs and is irrespective of whether or not the termination of the contract was lawful; that is, plaintiffs are saying that regardless of whether or not the termination of the contract violated Section 1 of the Sherman Act, as they assert in support of their territorial restriction claim, there was another and different violation of Section 1 of the Sherman Act which caused them injury.
>
> This other and different violation of Section 1 claimed by the plaintiffs is that after the contract was terminated there was a contract, combination or conspiracy to prevent them from selling their business, that this contract, combination or conspiracy in fact prevented them from selling their business and that this contract, combination or conspiracy restrained interstate commerce unreasonably.
>
> In order for plaintiffs to recover for this alleged violation of Section 1, plaintiffs must show that after the contract was terminated there was a contract, combination or conspiracy to prevent them from selling their business, if any, as a going concern, and that this contract, combination or conspiracy in fact prevented them from selling their business, if any, and that this contract, combination or conspiracy was in unreasonable restraint of interstate trade and commerce.

treated as irrelevant. The jury was instructed to consider the sale-of-business claim separate and apart from the termination, and "irrespective of whether or not the termination of the contract was lawful."[8] It follows that plaintiffs' recovery under the sale-of-business claim may be sustained only if there was evidence from which the jury could conclude that *after* termination plaintiffs owned a valuable asset. Such proof was lacking.[9]

Upon receipt of the letter of termination, as defendants accurately put it, "plaintiffs owned nothing but a contractual right to distribute the Bee for thirty-odd days." The witnesses who testified regarding the value of this right agreed that it was worthless.[10] Nothing in the distributorship contract purported to give

8. This portion of the instructions was necessary to enable plaintiffs to state a separate claim on the basis of McClatchy's refusal of permission to sell Newsstand No. 5 since the damage alleged under this claim and the termination claim was the same, *i.e.*, the going concern value of the distributorship.

9. We thus do not reach the following issues raised on defendants' appeal: (1) whether there was sufficient evidence that plaintiffs were prevented from selling their distributorship by a contract, combination or conspiracy that unreasonably restrained interstate commerce; and (2) whether there was sufficient evidence that defendants Eleanor and C. K. McClatchy and Walter Jones personally participated in or approved the allegedly unlawful conduct forming the basis of sale-of-business claim.

"It is well settled that a manufacturer may discontinue dealing with a particular distributor 'for business reasons that are sufficient to the manufacturer and adverse effect on the business of the distributor is immaterial in the absence of any arrangement restraining trade.'" *Bushie v. Stenocord Corp.*, 460 F.2d 116, 119 (9th Cir. 1972), *quoting Richetti v. Meister Brau, Inc.*, 431 F.2d 1211, 1214 (9th Cir. 1970). Allowing plaintiffs in the present case to recover antitrust damages on the sale-of-business claim after losing the termination claim would in effect reverse the well settled law on the antitrust implications of distributorship terminations. Allowing plaintiffs to recover on the sale-of-business claim after winning on the termination claim would be to permit duplicative recovery.

10. This was the opinion of defendants and other representatives of McClatchy. It was shared, however, by one of plaintiffs' experts, Robert Gilliland, and by two distributors who testified on behalf of plaintiffs. It also appears to have been the view of plaintiffs' counsel as reflected in the following exchange with defendant Gallagher:

plaintiff a right to sell, after termination, as if termination had not occurred.[11] There was no evidence of a trade practice to this effect.[12] The only reasonable conclusion the jury could draw from the record was that no damage had been shown under the sale-of-business claim. *See Chisholm Bros. Farm Equip. Co. v. International Harvester Co.*, 498 F.2d 1137, 1139-40 & n.5 (9th Cir. 1974). The insufficiency could not be cured by retrial; accordingly, the district court erred in refusing to grant the defendants' motion for judgment n.o.v.[13]

PLAINTIFFS' CROSS-APPEAL

Because plaintiffs' judgment on the sale-of-business claim must be reversed, we consider plaintiffs' contention that they are entitled to a new trial on the termination and monopolization claims because of alleged errors in the jury instructions and in the admis-

Q. And you do know that under this paragraph 11 of the contract the Bee could terminate you and you would have nothing to sell?

A. That's true.

11. The distributorship contract involved in *Albrecht v. Herald Co.*, 390 U.S. 145, 148 (1968), provided that if the contract were terminated the distributor would have 60 days to provide a satisfactory purchaser for his route, as the Court of Appeals pointed out, 367 F.2d 517, 519 (8th Cir. 1966).

12. It was established that terminated distributors of another newspaper, the Sacramento Union, were paid $1.00 per subscriber. But this payment was expressly provided for in the Sacramento Union's distributorship contracts. There is no similar provision in plaintiffs' contracts with McClatchy. Even under the Sacramento Union's contracts no sale of a distributorship has been made "after [a] dealer was terminated and the termination was unrescinded." The circulation manager of the Sacramento Union testified that he had twice rescinded terminations, but that the rescissions were not granted for the purpose of giving the distributors an opportunity to sell their routes.

13. For the same reasons, plaintiffs were not entitled to injunctive relief on the sale-of-business claim under § 16 of the Clayton Act, 15 U.S.C. § 26, providing such relief "against threatened loss or damage by a violation of the antitrust laws."

sion and exclusion of evidence. We conclude that a new trial is required on the termination claim.

Plaintiffs alleged that their distributorship was terminated in substantial part because they refused to accede to defendants' request that they give up a part of the territory covered by the distributorship. The district court instructed the jury as follows:

> If you should find from the evidence that defendants or some of them wished plaintiffs to agree to confine their sales of the Sacramento Bee to a particular part of Newsstand No. 5, that the plaintiffs refused to agree to this, and that their alleged refusal was a substantial factor in the termination of the contract, you must then determine whether, if plaintiffs had agreed to the arrangements, and unreasonable restraint of interstate commerce would have resulted, as a result of being a part of an alleged arrangement between the Sacramento Bee, its distributors and carriers.

Plaintiffs contend that the district court should have instructed the jury that an agreement to restrict the terriory in which newspapers purchased from McClatchy could be sold would have been a per se violation of section 1 of the Sherman Act, and it was therefore unnecessary for plaintiffs to prove an unreasonable restraint of interstate commerce would have resulted from such an agreement. Plaintiffs correctly state the law.

In *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967), the Supreme Court held:

> Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it . . . . Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale.

The rule of *Schwinn* is unequivocal:

> Once the manufacturer has parted with title and risk, he has parted with dominion over the products, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act.

388 U.S. at 382.[14]

Although the wisdom of per se rules with respect to territorial restraints has been the subject of substantial commentary,[15] the Supreme Court has adhered to *Schwinn* and, indeed, has expanded its prohibition. In *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), the Court held that horizontal as well as vertical territorial restraints were unlawful per se, rejecting the trial court's conclusion that the anticompetitive effect of a territorial restraint on intrabrand competition was outweighed by the increased ability

14. The opinion in this case deals only with the precise type of territorial restriction involved in *Schwinn*. We intimate no view whatever as to the rule to be applied to other dealer restrictions such as the location clauses involved in *GTE Sylvania, Inc. v. Continental T.V., Inc.*, No. 71-1705, now under submission to the court in banc.

15. *See, e.g.*, Averill, *Sealy, Schwinn and Sherman One: An Analysis and Prognosis*, 15 N.Y.L.F. 39 (1969); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 Yale L.J. 373 (1966); Chadwell & Rhodes, *Antitrust Aspects of Dealer Licensing and Franchising*, 62 Nw. U.L. Rev. 1 (1967); Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 Harv. Law Rev., 1419 (1968); McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal*, 37 Antitrust L.J. 137 (1967); Zimmerman, *Distribution Restrictions After Sealy and Schwinn*, 12 Antitrust Bull. 1181 (1967); Editorial Note, *Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason?*, 40 Geo. Wash. L. Rev. 123 (1971); Note, *Territorial Restrictions and Per Se Rules—A Reevaluation of the Schwinn and Sealy Doctrines*, 70 Mich. L. Rev. 616 (1972); Note, *United States v. Arnold, Schwinn & Co.—Vertical Customer and Territorial Restrictions and the Sherman Act*, 63 Nw. U.L. Rev. 262 (1968); Comment, *The Impact of the Schwinn Case on Territorial Restrictions*, 46 Texas L. Rev. 497 (1968); Case Comment, *Horizontal Territorial Restraints and the Per Se Rule*, 28 Wash. & Lee L. Rev. 457 (1971).

of dealers in Topco-brand products to compete in the inter-brand market. In justifying the per se approach in this area, the Supreme Court said (405 U.S. at 609-10):

> The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against preservation of competition in another sector is one important reason we have formulated *per se* rules.

The Court noted (405 U.S. 609-10 n.10):

> Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.

As the Fifth Circuit recently observed: "[W]e must accept the fact that the Court has set its face against both horizontal and vertical territorial restrictions with the possible exception of vertically imposed restrictions by 'new entrants' and 'failing companies' briefly mentioned in *Schwinn*." *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 943 (5th Cir. 1975).[16]

Defendants contend that application of *Schwinn* to the distribution of newspapers will be destructive of an orderly system essential to timely delivery of perishable news and advertising. There is nothing to indicate that independent distributors, their livelihood at stake, would fail to make timely delivery unless competition among them were eliminated by territorial restrictions. Lawful means less restrictive of intrabrand competition are available

16. Policy arguments against the *Schwinn* per se rule are examined and rejected by Judge Wisdom in an extensive footnote. 506 F.2d at 941-43 n.5.

if required to assure effective distribution.[17] Defendants' argument of necessity is particularly surprising in view of their equally vigorous insistence that they did not impose territorial restrictions on their distributors.

In any event the argument that need for speedy delivery of perishable products justifies an exception to the *Schwinn* per se rule has been rejected whenever raised. *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1187 (10th Cir. 1974); *Fairfield County Beverage Distributors, Inc. v. Narragansett Brewing Co.*, 378 F.Supp. 376, 378 (D. Conn. 1974); *cf. Copper Liquor, Inc. v. Adolph Coors Co., supra*, 506 F.2d at 947. In *Albrecht v. Herald Co.*, 390 U.S. 145, 153-54 (1968), a price-fixing case involving an independent newspaper distributor, the Supreme Court indicated that the *Schwinn* per se rule would be held applicable to just such a case as this.[18]

In *Adolph Coors Co. v. FTC, supra*, the Court of Appeals for the Tenth Circuit reluctantly applied *Schwinn* to the distribution of a perishable product, expressing the hope that "the Supreme Court may see the wisdom of grafting an exception to the *per se*

17. The decree on remand in *United States v. Topco Associates, Inc., supra*, allowed creation of territories of primary responsibility, so long as the device was not used directly or indirectly to achieve or maintain territorial exclusivity. *United States v. Topco Associates, Inc.*, 1973 Trade Cas. ¶¶ 74,391, 74,485 (N.D. Ill.), *aff'd mem.*, 414 U.S. 801 (1973). *See also White Motor Co. v. United States*, 372 U.S. 253, 271-72 & n.12 (1963) (Brennan, J., concurring).

18. The Court stated:

> Certainly on the record before us the Court of Appeals was not entitled to assume, as its reasoning necessarily did, that the exclusive [territorial] rights granted by [the newspaper] were valid under § 1 of the Sherman Act, *either alone or* in conjunction with a price-fixing scheme. *See United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 373, 379 (1967). The assertion that illegal price-fixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive. If, as the Court of Appeals said, the economic impact of territorial exclusivity was such that the public could be protected only by otherwise illegal price-fixing itself injurious to the public, the entire scheme must fall under § 1 of the Sherman Act. (Emphasis added).

rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason." But an exception to *Schwinn* based upon asserted uniqueness of product would be difficult to administer, and would introduce an element of uncertainty the per se rule was intended to eliminate. *United States v. Topco Associates, Inc., supra*, 405 U.S. at 609 n.10. As we read the *Schwinn* opinion, manufacturers may avoid the per se rule only by vertical integration or adoption of agency or consignment methods of distribution.[19] Manufacturers who wish to enjoy the advantages of distribution through independent entrepreneurs must be prepared to accept the burdens of *Schwinn*.

Manufacturers have a significant incentive to distribute their products through independent contractors rather than through employees, agents or consignees. Use of independent distributors avoids the substantial investment, expense, and risk incident to alternate methods of distribution.

The record in this case reflects other benefits. Paul Rothman, former circulation director of the Sacramento Union, testified, "the cost factor to have salaried employees in place of dealers

19. *Schwinn* approved a "rule of reason" approach to territorial and customer restraints imposed on agents or consignees of the manufacturers. The Court said, 388 U.S. at 380:

> Where the manufacturer retains title, dominion, and risk with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer, it is only if the impact of the confinement is 'unreasonably' restrictive of competition that a violation of § 1 results from such confinement, unencumbered by culpable price fixing.

We reject defendants' suggestion that plaintiffs' distributorship was analogous to the agency and consignment situations referred to in *Schwinn*. The distributorship contract expressly provided that the distributor was to be "an independent wholesale distributor and not . . . an employee." Conklin testified that plaintiffs were "dealt with as independent contractors," and the record establishes that plaintiffs in fact operated on this basis. They purchased their own trucks and equipment and hired their own employees. They agreed "to purchase" the Bee. Defendants concede that plaintiffs acquired title to the copies purchased. Plaintiffs could return unsold copies at cost, but assumed the full and substantial risk of loss from theft and other causes.

would represent two and a half or more times outlay for the publisher." The difference, Rothman explained, is that "a dealer works seven days a week," usually with the help of other family members, and "takes care of his own transportation and equipment."[20] Robert Gilliland, plaintiffs' expert on newspaper circulation practices, testified that in addition to these obvious economic benefits, independent distributors are "normally a harder working group of people and . . . have a more serious concern about the operation than a salaried employee."

Because of such advantages to manufacturers, independent distributors continue to survive, and bring to the public the benefits of added competition in the distribution of goods and services. These benefits would be lost if manufacturers could obtain the private economic benefits of a system of distribution through independent businessmen, and at the same time restrict the freedom of such independent businessmen to compete. It was to prevent the wholesale destruction of this opportunity for competition that *Schwinn* forbade manufacturers to control the disposition of products after sale. "To permit this would sanction franchising and confinement of distribution as the ordinary instead of the unusual method which may be permissible in an appropriate and impelling competitive setting, since most merchandise is distributed by means of purchase and sale." 388 U.S. at 379.

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20. Rothman testified:

A. Well, a dealer works seven days a week, because it's his business. His wife usually takes care of his books. If he has a couple of boys they carry a paper route. If it was an employee setup, they would be working five days a week, forty hours a week, and you would have to have one and a third man for each dealership plus the fact that you would have to have a relief man for it, plus the fact that anytime that they worked beyond that forty hours, and this dealership is practically a twenty-four hour affair, in case of an emergency, why, you would have to pay all that overtime, plus the fact that you would have to supply trucks, vehicles of all kinds, where the dealership, the dealer takes care of his own transportation, plus the fact that you would have to buy or print all your various forms which the dealer either pays for now or buys it himself.

Defendants contend there was no factual basis for a *Schwinn* instruction, because plaintiffs failed to establish that a split of their territory would have resulted in the imposition of a territorial restraint. Plaintiffs' distributorship contract did not define the boundaries of Newsstand 5, and did not expressly forbid plaintiffs from selling the Bee in areas other than Newsstand 5. Bua described the geographical boundaries of the city newsstand distributorship as areas of "primary responsibility," and on cross-examination Willard Noble answered in the affirmative when asked, "Now, as you understand it, this contract gave you an area of primary responsibility; did it not?" From this defendants argue that as a matter of law, no territorial restrictions existed.

The absence of an express territorial restriction is not fatal to plaintiffs' claim. There is no magic in the label "area of primary responsibility." It is enough if the restriction existed in fact, whether the product of an express or tacit understanding. *See United States v. Arnold, Schwinn & Co., supra*, 388 U.S. at 382; *Hobart Brothers Co. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 900 (5th Cir. 1973); *Beverage Distributors, Inc. v. Olympia Brewing Co.*, 440 F.2d 21, 28 (9th Cir. 1971); Zimmerman, *Distribution Restrictions After Sealy and Schwinn*, 12 Antitrust Bull. 1181, 1187-88 (1967). *But see Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637, 639 (10th Cir. 1973).

The jury could have inferred the existence of a tacit understanding from the evidence of numerous "suggestions" to plaintiffs that they split their territory, and from the testimony of Gallagher and two other city newsstand distributors that they always stayed within their assigned territories. *See Beverage Distributors, Inc. v. Olympia Brewing Co., supra*, 440 F.2d at 30. Willard Noble testified that there were "some fuzzy areas" at the boundaries of Newsstand 5, and admitted that he had unsuccessfully sought to have his "boundary lines spelled out." Nevertheless, the boundaries were sufficiently definite that at trial Bua was

able to outline all city newsstands on a street map of the Sacramento area. When plaintiffs' distributorship was split following termination, Bua marked out the boundaries of the two new distributorships on a map in his office. Bua exhibited this map to defendants Gallagher and Downing, plaintiffs' replacements. Gallagher testified that he knew the area he was going to take over "in terms of its definition by street boundaries."

The jury could have found, therefore, that the proposed division of plaintiffs' distributorship would have involved the imposition of a territorial restraint. There was also sufficient evidence that plaintiffs' refusal to agree to divide their distributorship was a substantial factor in their termination. Thus, the jury may have based the verdict for defendants upon a finding that the territorial restraint was not an unreasonable burden on commerce. Since under *Schwinn* the jury should have been instructed that such territorial restrictions are per se unreasonable, the judgment for defendants on the termination claim must be reversed and remanded for a new trial.

We do not agree with plaintiffs that a new trial is also required on the monopolization claim. Plaintiffs complain because the court instructed the jury that plaintiffs must prove that defendants "willfully acquired or willfully maintained monopoly power" *and* "had the intent and purpose to exercise the monopoly power." Plaintiffs correctly point out that while a general intent is required for actual monopolization it may be shown by proof of the willful acquisition or maintenance of monopoly power,[21] and it was improper for the court to state that both were required, as if they were independent. Although plaintiffs are technically correct, we think the redundancy was harmless.[22]

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21. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States v. Griffith*, 334 U.S. 100, 105-07 (1948).

22. It was harmless error, if error at all, to admit the published circulation reports of the Woodland Daily Democrat, the Grass Valley Union and the Colusa Sun Herald, without testimony from representatives of the newspapers that the reports were prepared in the regular course of business. The impact of the evidence was de minimis.

Two rulings of the trial court should be considered in view of the remand for a new trial. It was not error to exclude evidence that McClatchy deleted allegedly anticompetitive provisions in the distributorship contracts after plaintiffs' termination. Plaintiffs argue that "an inference of guilt or wrongdoing may be drawn," from such evidence; but it is well settled that evidence of subsequent remedial measures is not admissible to prove culpability of prior conduct. *See Boeing Airplane Company v. Brown,* 291 F.2d 310, 315 (9th Cir. 1961); Federal Rules of Evidence, Rule 407.[23]

We think it was error, however, to inform the jury that "it is the function and duty of the court in the event that you should award damages to treble that amount in the judgment." The sole function of the jury was to determine the amount of the damage actually sustained. The "probable consequence" of advising the jury of the tripling provision of section 4 of the Clayton Act, 15 U.S.C. § 15, "would be harmful—an impermissible lowering of the amount of damages." Such an instruction is an invitation to the jury to negate Congress' determination that actual damages should be trebled in order to deter antitrust violations and encourage private enforcement of the antitrust laws. *Pollock & Riley,*

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23. Plaintiffs contend that the contract changes were admissible to explain "the loss of market position by the Sacramento Bee after the filing of the lawsuit." We do not consider the merits of this argument. The evidence of the contract changes was not initially offered on this theory. Later defendants introduced an exhibit showing the Bee's circulation had declined from 1963 to 1971. Plaintiffs' counsel objected to the post-1969 figures, stating "if they are entitled to show what was happening in circulation since '69, I think we should be entitled to show that certain things were done that may have affected that circulation." Plaintiffs did not, however, re-offer proof of the contract changes.

Inc. v. Pearl Brewing Co., 498 F.2d 1240, 1242-43 (5th Cir. 1974).[24]

Defendants suggest that since jurors may be independently aware of the treble damage provision, an explanatory instruction is necessary to avoid jury confusion and the return of erroneous verdicts. "Our immediate reaction is that a district court can sufficiently instruct the jury to determine only *actual* damages. In those cases where an accidental revelation occurs, the court can give curative instructions to alleviate confusion." *Pollock & Riley, Inc. v. Pearl Brewing Co., supra,* 498 F.2d 1243 (emphasis in original; footnotes omitted).

The judgment for defendants on the termination claim is reversed and remanded for a new trial consistent with this opinion. The judgment for plaintiffs on the sale-of-business claim is reversed and remanded with instructions to enter judgment n.o.v. for defendants. The judgment for defendants on the monopolization claim is affirmed.

GRAY, District Judge, concurring and dissenting:

I am glad to concur in Judge Browning's opinion, except with respect to its holding that the trial court should make no mention of treble damages in instructing the jury. I think that the trial court should "level" with the jury and make sure that the members thereof understand the respective responsibilities of jury and court with respect to damages, just as the trial judge in this case did.

Jurors, like other citizens, are entitled to know what the law is, even with respect to damages in antitrust cases; presumably, many

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24. *Accord, Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 665-67 (5th Cir. 1974); *Standard Indus., Inc. v. Mobil Oil Corp.*, 475 F.2d 220, 223-24 (10th Cir. 1973); *Semke v. Enid Auto Dealers Ass'n*, 456 F.2d 1361, 1370 (10th Cir. 1972); *Sablosky v. Paramount Film Distrib. Corp.*, 137 F. Supp. 929, 941-42 (E.D. Pa. 1955); *Webster Motor Car Co. v. Packard Motor Car Co.*, 135 F. Supp. 4, 10-11 (D.D.C. 1955), *rev'd on other grounds*, 243 F.2d 418 (D.C. Cir. 1957). *But see Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.*, 203 F.2d 676, 678-79 (2d Cir. 1953); *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 900, 911 (D. Mass. 1954).

of the people who serve on juries have some awareness in these matters. If no explanation is given as to who does the multiplying by three, the jury might well assume that the responsibility is theirs and thus do it without anyone becoming aware that the "damages" have already been trebled. A judge fixes damages in an antitrust case in full knowledge that the amount will be tripled; I see no valid reason why we should try to conceal from a jury the ultimate effect of their verdict.

Appendix B

United States Court of Appeals
for the Ninth Circuit

WILLARD M. NOBLE and ETTA M. NOBLE,
Plaintiffs-Appellees,

vs.

McCLATCHY NEWSPAPERS, a corporation, et al.,
Defendants-Appellants.

No. 72-2021

WILLARD M. NOBLE and ETTA M. NOBLE,
Plaintiffs-Appellants,

vs.

McCLATCHY NEWSPAPERS, a corporation, et al.,
Defendants-Appellees.

No. 72-2042

ORDER

[May 20, 1976]

Before: BROWNING and TRASK, Circuit Judges,
and GRAY,* District Judge

The petition for rehearing was held pending the decision in *GTE Sylvania, Inc. v. Continental T.V., Inc.*, ... F.2d ..... (9th Cir. 1976). It is now denied.

As noted in the opinion in this case (*see* note 14), this case and *GTE Sylvania* deal with different questions. This case and *Schwinn* involve the legality of restrictions upon the territory in which a purchasing dealer may resell. The majority opinion in *GTE Sylvania* considers whether "Sylvania's practice of fixing by agree-

*Honorable William P. Gray, United States District Judge, Central District of California, sitting by designation.

ment the locations from which Continental was authorized to sell Sylvania's products was illegal *per se* under Section 1 of the Sherman Act." *Id.* at ..... The majority opinion in *GTE Sylvania* approves the result reached in this case. However, it disapproves "any language in the *Noble* opinion that may be inconsistent with any of the language" in *GTE*. *Id.* at ..... n.42. Accordingly, we have reexamined the opinions in both cases. We conclude that there are no inconsistencies between them and therefore make no modification of the language of the opinion in this case.

Appendix C

Portions of the record on appeal from the United States District Court, Northern District of California, as indicated.

OPENING STATEMENT ON BEHALF OF PLAINTIFFS

"MR. FINE: Ladies and gentlemen of the jury, my name is Timothy Fine. I have already been introduced to you. I am the attorney for Willard M. Noble and his wife Etta M. Noble. I apologize that his wife is not here today. They have a small retail business in Stockton and she is minding the store while Mr. Noble is here.

"This case is an antitrust case. It is something that many times you never heard of. If you have heard of it it is something which you think of the United States Government or you think of something way beyond.

"What is an antitrust case? Well, we all know when we read the papers to a certain extent the Government's activities in this field of antitrust. But there is also a second field of antitrust outside the Government. This is a field that pertains to the commercial and business world. This pertains to the small businessmen, the middle businessman, the large businessman. The antitrust laws not only are enforced by the Government but by private parties who are in business or who have property can also avail themselves of the antitrust laws.

"There is a statute of the United States of America known as Section 4 of the Clayton Act which provides that any person who has been injured in his business or his property may sue under the antitrust laws of the United States of America. These laws are designed to maintain a free and competitive economic system. They generally have two names which you may have read about from time to time. . . ." **[1 R. 6-7]**

Excerpts of the testimony given at trial by defendant-petitioner Carlo Bua.

"MR. BERTAIN:* Q. Mr. Bua, I now show you a map purportedly published by the Gulf Oil Company pertaining to the City of Sacramento and environs and ask you whether or not you ever saw this particular document before.

"A. [By Mr. Bua]. Yes. I prepared that the day of my deposition.

"Q. That deposition was taken by me, was it not, in Sacramento?

"A. That's correct.

"Q. Did you affix to this particular document certain markings outlining the various geographical boundaries of various city newsstand distributors?

"A. I outlined the general area of the primary responsibility, yes.

"Q. I show you the reverse side. Now I would like to have you state, if you can, Mr. Bua, by reference to that particuar map that you have before you the geographical boundaries of Newsstand 5 prior to the effective date of the termination of Mr. Noble.

"A. This will be a little confusing. It's on both sides of this sheet . . .

"But mind you this is all done by memory.

"Q. Yes.

"A. His general area of responsibility was bounded on the south by the American River and west to the Interstate 880, the Freeway, up to El Camino Avenue, east to Watt Avenue, then west again to the Freeway, continuing north to Spruce Avenue."

[7 R. 837-38]

Excerpts of the testimony given at trial by plaintiff-respondent Willard M. Noble.

"Q. [By Mr. Haas]** Now, we have talked quite a bit in this case about Newsstand No. 5. That was always a vague description really; wasn't it?

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*Counsel for plaintiffs-respondents.
**Counsel for defendants-petitioners.

"A. [By Mr. Noble] Well, it had some fuzzy areas, let's put it that way, as far as the borderline.

"Q. Uh-huh. And I think you testified that when you took over from Larson, you were given a general area or description?

"A. I was given a route list.

"Q. And that was simply a list with names and addresses on it; is that what you mean by a route list?

"A. Yes. Yes.

"Q. And it was your understanding that you were going to handle the Bee in just this general area, period?

"A. Newsstand No. 5, yes.

"Q. Uh-huh. And as you saw it, this contract didn't define any area?

"A. No.

"Q. You mean what I say is correct?

"A. Yes.

"Q. And your understanding is that whenever a person felt he could sell papers, wherever a person felt he could sell papers, it was his duty to have coverage in those areas?

"A. Yes.

"Q. Now, you felt all along, did you not, that the Bee should have defined to all the dealers just where their prime responsibilities lay?

"A. Yes, I would say so.

"Q. And you have seen, as we have put into evidence here, these contracts with the Sacramento Union home delivery dealers that have maps attached to them?

"A. Yes.

"Q. But there was never any map attached to your contracts with the Bee, was there?

"A. No.

"Q. And you wanted to have definite boundary lines established; didn't you?

"A. Yes, I would say so.

"Q. And that would be so that you would know where your area of prime responsibility was?

"A. Yes.

"Q. And one of your complaints to the Bee management was that you wanted to have your boundary lines spelled out?

"A. Yes.

"Q. Uh-huh. And you wanted those lines spelled out so that everyone would know where he was supposed to go?

"A. I wanted them for my purpose. I wanted to know where I was to have the responsibility and possibly my adjoining neighbor distributor, you might say, so there wouldn't be any confusion.

"Q. But Mr. Conklin told you that he wouldn't establish any boundaries; isn't that true?

"A. He said, 'We can't.'

"Q. All right. And he was pretty definite about that?

"A. That's about all he said.

"Q. Now, as you understood it, this contract gave you an area of primary responsibility; did it not?

"A. Yes."

[13 R. 1782-85]

* * * * *

"Q. [By Mr. Haas] Now, you don't know Mr. McMann's address?

"A. [By Mr. Noble] No.

"Q. But you would telephone him?

"A. Or he would tell me.

"Q. Uh-huh. And you would call him up and say, 'Tomorrow I have got some to sell and there's like 50 cents worth of coupons in the paper'?

"A. Words to that effect.

"Q. Words to that effect, and then Mr. McMann would come by your house and make a buy?

"A. He usually, his brother.

[13 R. 1791]

* * * * *

"Q. Now, how many papers at a time would you sell to McMann under this arrangement?

"A. Oh, it's hard to say, depend on what he wanted.

"Q. Like five hundred at a time?

"A. If he wanted five hundred.

"Q. Or a thousand at a time if he wanted them?

"A. I don't believe I ever sold him that many.

"Q. And what he was particularly interested in were the papers that had a lot of coupons in them, wasn't he?

"A. Yes, supposedly.

"Q. Well, you don't have to suppose. He came around and bought them, didn't he, or he sent somebody to pick them up?

"A. Yes.

"Q. And in one of these five hundred papers transactions, this man could walk away with what, two or three thousand coupons?

"A. I don't know. I couldn't really tell that.

"Q. Well, you know how many coupons were in the paper, Mr. Noble, because you were getting that information from the Sacramento Bee.

"A. That's right.

"Q. So when I ask you if five hundred papers could have had two or three thousand coupons, you know?

"A. It could have.

"Q. Or four thousand?

"A. It could have.

"Q. What did you charge McMann for these papers?

"A. Ten cents apiece.

"Q. So if you sold him five hundred of these papers, you got fifty dollars?

"A. Yes.

"Q. A check?

"A. Cash.

"Q. Always cash?

"A. Yes.

"Q. And how did you enter that cash in your records?

"A. I put that in with my vending machine cash.

"Q. With your coin returns?

"A. With my vending machine cash.

"Q. I see.

Now, the only way in which you were restricted by the Bee in selling was the restriction that you were not to do this, to sell these papers of this kind to people of this kind; is that right?

"A. Well, this is what they requested of me.

"Q. I am saying that the only restriction on what you could do with your papers. The Bee would love it if you would go out and sell a thousand papers legitimately, wouldn't they?

"A. Oh, I imagine they would.

"Q. And the only restriction that was placed on you at any time about what you were to do with these papers was that you weren't to do this with McMann or other people like McMann?

"A. I would say yes.

"Q. Now, besides McMann, who did you make these bulk sales to and by 'bulk sales', Mr. Noble, I mean this kind of transaction, a bulk of yesterday's newspapers to somebody who wants the coupons?

"A. I believe there was a young man by the name of Jimmy. I don't know his last name because it's a long foreign name."

[13 R. 1792-95]

* * * * *

"Q. Now, you have given some testimony about selling bags of coupons—I am not talking now, about returns, I am talking about bags full of coupons; correct?

"A. Yes.

"Q. How many of these bags did you sell?

"A. Oh, I believe I told you two or three maybe. I don't remember right offhand.

"Q. Maybe three or four?

"A. Two or three.

"Q. It couldn't be three or four?

"A. Three is three. I said three.

"Q. Could it be four?

"A. I doubt it. More like two or three. It could have been, but I couldn't swear to it, so I won't—

"Q. You couldn't swear whether it was three or four?

"A. No.

"Q. Could you swear that it wasn't five?

"A. No.

"Q. Or six?

"A. No."

[13 R. 1810-11]

* * * * *

"Q. Now, from whom did you physically receive these bags of coupons?

"A. I know of one time that I received them from my driver, Mr. William Harran or Robert Harran.

"Q. I want you to be sure you understand my question.

I am talking about the name of the man who physically handed you the bag. Is that what you are talking about?

"A. That's what I am talking about.

"Q. Okay.

"A. And there may have been a time or two that I received them from Max McCurdy himself."

[13 R. 1812]

* * * * *

"Q. Now, is it your testimony that McCurdy owed you money and he was paying you off in these coupons?

"A. Well, he owed me money for vending machine parts and vending machine, whatever the case may be, and he asked me to sell these coupons for him to apply to his bill. It had been on the books quite some time, so I knew he was kind of hard pressed, so I did it to help him out."

[13 R. 1814]

* * * * *

"Q. Now, how much did McCurdy owe you?

"A. I really don't know. It could have been $30. It could have been $100. I can't say now.

"Q. Your books show that?

"A. Yes. I have sales slips that shows my record of any sales that I might make, and the record of credits to the accounts.

"Q. Where are those records?

"A. I turned them over to my attorney.

"Q. Okay.

"Now, what was the face value of these coupons that you got from McCurdy?

"A. I have no idea.

"Q. No idea?

"A. It could be a nickel, it could be a dime. I have no idea.

"Q. I am not talking about each individual coupon. I am talking about this bag that you got from McCurdy. In the whole bag, what was the total face value of these coupons?

"A. I couldn't say.

"Q. You don't have any idea?

"A. No.

"Q. But you took them to the grocer and you sold them, didn't you?

"A. Yes.

"Q. And he paid you something for them?

"A. Yes.

"Q. And what did he pay you for them?

"A. I couldn't tell you. I don't remember. It wasn't a whole lot of money.

"Q. Was there some formula on the basis of which the grocer paid you?

"A. Yes.

"Q. What was the formula?

"A. He paid fifty cents on the dollar.

"Q. But you had no idea what the grocer paid you?

"A. No, not at this time. My records would indicate it, though.

"Q. Your records would indicate that?

"A. A credit to McCurdy's account."

[13 R. 1816-18]

* * * * *

Excerpts of the testimony given at trial by Paul B. Rothman, called as a witness by plaintiffs.

"Q. [By Mr. Bertain]* And would you state for us approximately when it was and where it was that you first entered the newspaper business?

"A. I have been in the newspaper business for approximately fifty-five years."

[12 R. 1534-35]

* * * * *

"MR. BERTAIN: I want to establish the foundation of this witness, Your Honor, as to his expertise in the newspaper business and particularly in the field of the circulation of newspapers.

"MR. HAAS: Well, this, then, is to be another expert witness?

"MR. BERTAIN: Yes.

"THE COURT: That's what I assumed."

[12 R. 1536]

* * * * *

"Q. [BY MR. HAAS] Now, your job for approximately ten years was to attempt to increase the circulation of the San Francisco Chronicle in the country?

"A. Northern California.

"Q. Northern California?

"A. Yes, sir.

"Q. Were you successful at that?

"A. I think so.

"Q. And you were the person who signed up Chronicle distributors and Chronicle carrier boys in the country?

"A. Yes, sir.

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*Counsel for plaintiffs-respondents.

"Q. There were written contracts, were there?

"A. Yes, sir."

[12 R. 1592-93]

* * * * *

"Q. [BY MR. HAAS] And you alluded to the carrier boy's route. Did these carrier boys have routes?

"A. Uh-huh.

"Q. And they were supposed to cover their routes?

"A. Uh-huh.

"Q. And they weren't supposed to go out on somebody else's route, were they?

"A. No.

"Q. And what would be the reason for that?

"A. Well, the time element, number one. Number two would be that the amount of papers in that, the amount of homes in that given area and he had enough to do to take care of that.

"Q. Right. And if you're going to get any newspaper distributed, you have to have some orderly method of distribution; isn't that right?

"A. That's right.

"Q. Everybody has to know where he is going to go next?

"A. Right.

"Q. The customers?

"A. We're talking about carrier boy.

"Q. We're talking about the carrier boy?

"A. That's right.

"Q. The boy has to know where to go?

"A. That's right.

"Q. And he is going to go there?

"A. That's right.

"Q. And you have to know who is responsible to whom because if Mrs. Smith doesn't get the paper, you have to find out who is responsible?

"A. That is right, sir.

"Q. And you can't just have carrier boys running around where they want to?

"A. That is right."

[12 R. 1595-96]

* * * * *

"Q. [By Mr. Haas] And was it also common practice in the newspaper business to have carrier boys have routes and that they be limited to serving those routes?

"A. As a rule it is a common practice; yes, sir.

"Q. All over the United States?

"A. All over the United States; yes, sir.

"Q. Now, did the country distributors for the Chronicle, while you were with the Chronicle, each have an area that he was supposed to take care of?

"A. Uh-huh.

"Q. A territory?

"A. Uh-huh.

"Q. And was he supposed to confine his activities to that territory?

"A. In that area; yes, sir.

"Q. And what was the reason for that?

"A. Well, the same reason that the carriers, that he had just so many things that he could do and so many miles that he could cover and so many places he could go to.

"Q. And was that type of provision common place in the newspaper industry?

"A. It is.

"Q. Throughout the United States?

"A. Throughout the United States."

[12 R. 1597-98]

Excerpts of the testimony given at trial by Dick D. Chaney, called as a witness by plaintiffs.

"Q. [By Mr. Fine] And will you state by whom you are presently employed?

"A. I am employed as circulation manager of the Sacramento Union."

[5 R. 465-66]

* * * * *

"Mr. Haas: Q. Let me hand you what has been marked as Exhibit 32 in evidence.

You will recall that these are the various forms of contracts of the Sacramento Union which Mr. Fine discussed with you this morning.

Will you turn, please, to the last page of that exhibit which is the Junior Independent Merchant Agreement.

Do you have that before you, sir?

A. Yes, sir.

Q. Would you read, please, to the jury, the provision of Paragraph 1(a).

A. "The dealer agrees to grant to carrier the exclusive right to deliver copies of the Sacramento Union in the territory designated as Route No. blank."

"Q. Now, the Home Delivery Contract, which is immediately preceding that Junior Independent Merchant Agreement, would you read to the jury the provisions of Paragraph 1(a).

"A. Company will grant to the contractor the exclusive right to deliver and sell to home subscribers copies of the morning daily and Sunday newspaper known as the Sacramento Union in District ....., a map of which is attached hereto as Exhibit A."

"Q. Does that mean that each home delivery dealer has an exclusive territory laid out on a map?

"A. That is correct.

"Q. And by an exclusive territory, I mean that he alone is the only person who is permitted to sell the Sacramento Union to home subscribers in that particular area?

"A. That is correct.

"Q. And that he has no competition from any other home delivery Union dealer in his own area?

"A. That is correct.

"Q. That is, he is limited to selling in a territory which is defined by this map?

"A. That is correct. How do we phrase that, that is not completely correct. He can possibly sell subscriptions in other areas, however, he cannot service or gain the profits of that particular subscription.

"Q. And what is the reason for that, Mr. Chaney?

"A. Well, the primary reason is if we did not exercise control along the lines of this, if Mrs. Smith would call in and complain about not receiving her paper, we wouldn't have the slightest idea who was her dealer or who to contact to make sure that she did get the paper.

"On the other hand, if we did not keep this type of information on hand, it would be virtually impossible for us to tell an individual dealer that Mrs. Smith wanted to subscribe, so we have to have something along those lines.

"Q. And by a parity of reasoning the dealer has just the same kind of arrangement with his carrier boys, correct?

"A. That is very true.

"Q. Now I ask you to imagine a situation in which instead of having these territories for the dealers and for the carrier boys, you pile up the, let's say, 60,000 copies of the Sacramento Union that are going to be sold in your city area one morning. You just pile them all up on the dock and you just have all the boys come down and all the dealers come down, and you sell them whatever they want, and they run out anyplace they want in Sacramento and attempt to sell them.

"In your opinion, is that kind of a feasible way to distribute a newspaper?

"A. It could be complete chaos.

"Q. It is essential, is it not, Mr. Chaney, that the newspaper be distributed in a timely manner?

"A. Our livelihood depends on it.

"Q. Your life depends on it, because if the subscriber does not get the paper when he is supposed to get it, he may take some other paper, like my client's paper?

"A. That is very true.

"Q. And throughout the newspaper business time is of the essence, is it not?

"A. Yes, very much so.

"It is not just from a subscriber's standpoint, it is from the advertiser's standpoint. If we can't get it into a home, if they are going to advertise in the morning newspaper, they expect it to be there for that individual to read the morning before he goes to work. If he can't read it, they are not going to advertise with us."

[5 R. 584-87]

Exemplars of newspaper articles in evidence regarding triple-damage antitrust cases.

[San Francisco *Chronicle*, Tuesday, October 5, 1971, page 1]:

TESTIMONY BEGINS ON ALIOTO TRIAL

"By George Draper
Chronicle Correspondent

Vancouver, Wash.

Mention of a $10,000 check that former Washington State Attorney General John J. O'Connell allegedly cashed in a Las Vegas casino in 1968 highlighted the opening yesterday of the $2.3 million civil-suit trial against San Francisco Mayor Joseph L. Alioto.

The check was brought up by attorney William Helsell in his opening statement in behalf of a group of cities

and public utilities districts suing Alioto, O'Connell and O'Connell's former assistant, George K. Faler. * * *

Alioto, O'Connell and Faler are being sued for recovery of $2.3 million in legal fees paid Alioto in the mid-'60s for prosecuting a series of treble-damage antitrust suits against large electrical manufacturers. Of that sum, Alioto gave O'Connell about $530,000 and Faler about $272,000.

The group now suing for recovery of the full $2.3 million is claiming it was not informed that the fees were to be shared by Alioto with the attorney general and his special assistant. * * *

[Ex. F to CT 732-43]

[San Francisco *Chronicle*, Wednesday, November 17, 1971, page 31]:

$300,000 AWARD IN TRUST SUIT

A jury yesterday awarded a judgment of $300,000 to Ford Wholesale Co. Inc., San Jose, in its treble-damage trade restraint suit against Fibreboard Paper Products Corp.

Ford charged that Fibreboard refused to sell its roofing products to Ford when it opened a warehouse facility in Oakland.

The case was heard by U.S. District Judge William T. Sweigert. Attorneys for the plaintiff in the action were Joseph M. Alioto and Maxwell Blecher, the son and a former associate of San Francisco Mayor Joseph L. Alioto.

[Ex. D to CT 732-43]

[San Francisco *Chronicle*, Tuesday, July 13, 1971, page 8]:

SUIT FILED IN TRADING STAMP WAR

A $10 billion antitrust suit, charging racial slurs, was filed in federal court here yesterday by the recently formed Black and Brown Trading Stamp Corp.

Named as defendants are Blue Chip Stamps, 13 major oil companies and seven super-market chains, all of whom give trading stamps to customers. * * *

The suit asks for $160 million actual damages from each defendant which, when trebled, is $10,080,000,000. In antitrust suits, if damages are proved, the damages are automatically trebled. * * *

[Ex. G to CT 732-43]

Excerpts from the trial court's instructions to the jury.

"[THE COURT] The second claim in this case is that the plaintiffs, Willard M. Noble and Etta M. Noble contend that they were injured by reason of defendants' alleged violation of Section 1 of the Sherman Act, in that the plaintiffs' refusal to agree to defendants' territorial restrictions on their sale and distribution of the Sacramento Bee Newspaper by splitting their dealership in half was a substantial factor in causing defendants to terminate them as distributors of the Sacramento Bee Newspaper, effective July 1, 1969.

"I will refer to this claim as plaintiffs' territorial restriction claim.

"Plaintiffs' territorial restriction claim is allegedly based on another Federal statute called Section 1 of the Sherman Act. That statute makes illegal any contract, combination or conspiracy which unreasonably restrains trade or commerce among several States or with foreign nations."

[17 R. 2333]

* * * * *

"[THE COURT] If you should find from the evidence that defendants or some of them wished plaintiffs to agree to confine their sales of the Sacramento Bee to a particular part of Newsstand No. 5, that the plaintiffs refused to agree to this, and that their alleged refusal was a substantial factor in the termination of the contract, you must then determine whether, if plaintiffs had agreed to the arrangement, an unreasonable restraint of interstate commerce would have resulted as a result of being a part of

an alleged arrangement between the Sacramento Bee, its distributors and carriers."

[17 R. 2335-36]

* * * * *

"[THE COURT] Section 4 of the Clayton Act provides that:

> 'Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.'

"If you should find from a preponderance of the evidence in the case that the plaintiffs, or either of them, are entitled to an award of damages, you must limit the amount of damages to the sum you shall find from the evidence was actually and proximately caused by the violation or violations of the Federal antitrust laws which you find to have occurred.

"You must not treble that amount and you must not include any sum for costs of suit or for a reasonable attorney's fees since it is the function and duty of the Court in the event that you should award damages to treble that amount in the judgment and it is also the Court's function to determine any, include in the judgment the amount properly to be allowed as plaintiffs' costs of suit including a reasonable fee for plaintiffs' attorneys.

"You have been instructed that the plaintiffs brought this action in this Federal Court under the provisions of Section 4 of the Clayton Act. Congress enacted Section 4 of the Clayton Act in 1914. Congress thereby granted the right to any party who had been injured in his business or property by reason of anything forbidden in the antitrust laws to sue and recover three times actual damages, to recover his costs of suit including a reasonable attorney's fees. Thus, these types of cases have been known as private treble damage antitrust actions. The private cause of action was intended by Congress to serve the dual purpose of permitting those injured by violations of the antitrust laws to recover damages and to aid the United States Government in enforcing the antitrust laws.

"In authorizing private remedies for persons injured by infractions of the antitrust laws, Congress intended to provide not only for private redress in damages, but also to secure more effective enforcement of antitrust legislation.

"The private antitrust action is a sanction granted to private —to a private plaintiff as distinct from the United States Government because of the public interest. It is clear that Congress imposed the penalty of treble damages on violators of the antitrust laws in order to deter other violators of the antitrust laws and to supply an ancillary force of private attorneys general to supplement the United States Department of Justice Antitrust Division in the enforcement of the Federal antitrust laws.

"The matter of treble damages is no function of the jury in a case of this kind and your function is to determine as accurately as you can from the evidence which you have heard the amount of compensation which will actually compensate the plaintiffs for any injury to their business or property, no more, no less. You are not to include any such items, for example, as costs of litigation, attorney's fees, interest or any other such item. Your function is only to determine the actual damages, if any, sustained by the plaintiffs."

[17 R. 2345-47]

Instructions Requested by Plaintiffs, but Refused by the District Court.

Plaintiffs' territorial restriction claim is based on Section 1 of the Sherman Act. That statute provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Pursuant to this provi-

sion of the antitrust laws certain agreements or practices are conclusively presumed to be illegal because of their pernicious effect on competition and lack of any redeeming virtue. These agreements or practices are called *per se* violations. One such *per se* violation is vertically imposed restrictions upon the resale of a product by a manufacturer after he has parted with ownership of it. That is to say, once a manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act.

In the instant case plaintiffs claim that defendant McClatchy Newspapers, pursuant to explicit written agreements, silent combinations, and understandings with its city carriers, country carriers, country distributors and city newsstand distributors restricted the territory where the Sacramento Bee may be sold by said carriers and distributors after defendant McClatchy Newspapers parted with ownership of the Sacramento Bee. If you find that this is the case then you shall find that defendant McClatchy Newspapers violated Section 1 of the Sherman Act.

Because a vertically imposed restriction upon the resale of a product by a manufacturer after it has parted with ownership of it is a *per se* violation of Section 1 of the Sherman Act it is unnecessary for plaintiffs to prove that there has been a restraint of interstate trade and commerce as a result of such restriction—it is presumed.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-86

MCCLATCHY NEWSPAPERS, a corporation; ELEANOR MCCLATCHY; C. K. MCCLATCHY; BYRON CONKLIN; and CARLO BUA,
Petitioners,

vs.

WILLARD M. NOBLE and ETTA M. NOBLE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

G. JOSEPH BERTAIN, JR.,
TIMOTHY H. FINE,
50 California Street, Suite 955,
San Francisco, California 94111,
Telephone: (415) 981-4938,
Attorneys for Respondents.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A of Petition) is officially reported at 533 F.2d 1081. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether or not certain agreements or practices, which fall within the category of *per se* offenses, are conclusively presumed to be unreasonable, and therefore illegal *per se,* when they operate on news and advertisements transmitted in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public?

2. Whether or not the rule that it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it should be amended to permit an exemption for the distribution of news and advertisements transmitted in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public?

3. Whether or not it is error to specifically inform the jury that it is the function and duty of the court in the event that the jury should award damages to treble that amount in the judgment.

STATUTES INVOLVED

The pertinent provisions of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. §1) and the Clayton Act (38 Stat. 731, 15 U.S.C. §15) are set forth in the Petition at pp. 2-3.

STATEMENT OF THE CASE[1]

The parties stipulated to the following facts (CT 346) pertaining to interstate commerce:

"The Sacramento Bee is the only daily newspaper of general circulation published in the afternoon, Monday through Friday, in Sacramento, California. Its total average paid circulation for the twelve months ending March 31, 1965 through March 31, 1970 is as follows:

12 mos. ending	*Av. daily pd. cir.*	*Av. Sun. pd. cir.*
1965	171,204	191,981
1966	174,773	197,859
1967	177,265	202,044
1968	175,747	203,502
1969	174,404	206,810
1970	173,250	210,096

"The Sacramento Bee is distributed in California, in Nevada, in Oregon, in other States of the United States, and in foreign countries. Some of the news, feature materials, comics and other information published in the Sacramento Bee is regularly gathered from all parts of the United States and from foreign countries and is distributed and delivered by various means in interstate and foreign commerce to the Sacramento Bee. Some of the advertising published in the Sacramento Bee is sold in interstate commerce through-

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[1]Respondents were the plaintiffs in the District Court and will hereinafter be referred to as plaintiffs. Petitioners were the defendants in the District Court and will hereinafter be referred to as defendants. RT refers to the Reporter's Transcript of the trial proceedings; CT refers to the Clerk's Transcript on appeal to the United States Court of Appeals; and Plts. Ex. refers to plaintiffs' exhibit admitted in evidence at the trial.

out the United States. In the sale of such advertising there is a continuous flow in interstate commerce of advertising contracts, copy and payments between advertisers and the Sacramento Bee. In addition, some of the advertising published in the Sacramento Bee pertains to goods and services produced and sold throughout the United States. Such advertising helps develop markets for such goods and services."

In addition, Plts. Ex. 60 admitted into evidence sets forth as of April 22, 1970 the name of each wire and/or news service purchased by McClatchy Newspapers and the name of each comic and other feature which was purchased for publication in The Sacramento Bee. (RT 1986-87). Also, Mr. John Hamlyn, general counsel for McClatchy Newspapers, testified that the firm of Cressmer, Woodward, O'Mara & Ormsbee is McClatchy Newspapers' national advertising representative, that they have offices throughout the United States, and that their function is to "contact advertising agencies and national advertisers and attempt to secure from them national advertising to appear in the Sacramento Bee." (RT 111). Mr. Hamlyn testified that the advertisement is prepared by either the national advertiser or his agency or both, that the advertisement is either in the form of copy or a mat, and that the copy or mat is shipped through the mails to Sacramento from cities throughout the United States. (RT 113). Mr. Hamlyn testified that over ninety five percent of all newsprint used by The Sacramento Bee comes from outside the State of California. (RT 119).

Finally, Mr. Hamlyn testified that except for distribution through the mail, The Sacramento Bee is distributed through independent carriers, country distributors and city newsstand distributors (RT 141); that news stories received by The Sacramento Bee through the various wire services were in The Sacramento Bee handled by plaintiffs and other independent carriers and distributors; that the features, comics and syndicated columns which were subscribed to by The Sacramento Bee were in The Sacramento Bee handled by plaintiffs and other independent carriers and distributors; and that the national advertising originating throughout the United States was in The Sacramento Bee handled by plaintiffs and other independent carriers and distributors.

Plaintiff Willard N. Noble became an independent contractor for the purchase, distribution and resale of The Sacramento Bee to retail outlets and from vending machines on October 1, 1960 in an area known as Newsstand No. 5, located in the counties of Sacramento and Placer in the State of California. (CT 343-44). At that time Newsstand No. 5 was one of nine newsstand areas served by independent contractors, known as newsstand distributors; it was the largest newsstand geographically, but one of the smallest in circulation. (RT 1647-48).

Plaintiff Willard M. Noble testified that when he became a Sacramento Bee distributor it was a one-man operation and "I worked seven days a week myself. There wasn't great enough income at the time to start hiring somebody right off the bat." (RT

1652). Mr. Noble further testified that his wife would answer the telephone, deliver papers, do book work and count money. (RT 1652).

Mr. Noble testified that he and his wife ran the dealership without help for probably a year and a half to two years (RT 1672); that as it increased in circulation he hired one driver, then two drivers and three drivers until finally about a year and a half before his termination (on July 1 ,1969) he did not engage in the physical delivery of the newspapers except as a relief man when a driver was off (RT 1689, 1700-01); that the increase in circulation and the hiring out of the physical delivery provided increased coverage for The Sacramento Bee because he was able to give his accounts both the first and final editions (RT 1691); that the increase in circulation and the delegation of the delivery to others also made for more timely delivery because you can cover the area faster (RT 1690); and that as others took over the delivery he devoted his time to promoting the sale of The Sacramento Bee and maintaining his vending machines. (RT 1692).

Mr. Noble testified that the circulation of The Sacramento Bee in his area from the time he became a distributor until his termination on July 1, 1969 increased fourfold on the daily side and fivefold on the Sunday side. (RT 1766-67). Mr. Noble also testified that his relationship with his store customers was such that "they trusted me and we operated on an honor system" (RT 1664); that the number of newspapers he left with each store each day and the number of un-

sold newspapers he picked up the next day were unknown to the store in that they trusted his counts; and that this is unusual in this business. (RT 1662-63).

Mr. William H. Hall, who worked for Mr. Noble as a driver and, in addition, was a home delivery dealer for The Sacramento Union in District 100, testified that he observed Mr. Noble in the conduct of his business, that he and most other dealers had dealings with Mr. Noble because of his rack repair, parts and newspaper supply business, that Mr. Noble was considered a model dealer and a leader, and that "as far as I was concerned, I don't think there was a dealer at the Sacramento Bee that ran his district as efficient as Mr. Noble did because I had a district of my own, I knew what was involved in paper work procedure, the amount of hours you had to spend, and there wasn't a time that a rack was ever broken down that within a matter of an hour or so that Mr. Noble wasn't out there repairing it." (RT 1528-30).

Mr. Scott Berry, former city newsstand distributor in Newsstand No. 3, testified (via deposition testimony read into the record) that Mr. Noble ran things pretty close and pretty tight, that Mr. Noble kept accurate accountings, that he was too damned businesslike for that kind of business and that "he hired as much help as he could possibly afford to use, according to what he said, to have time to go out and pioneer new places, and get—keep his racks up, and get new stores. He'd try outlets—according to his drivers, he'd try outlets that I wouldn't even think of wasting my time on." (RT 1620-21).

Defendant Byron Conklin, circulation manager of The Sacramento Bee, testified that Mr. Noble was recognized as a man with some experience, that he was very circulation conscious (RT 1062), that Mr. Noble worked very hard to service his dealership (RT 1086) and that Mr. Noble did "a hell of a job" for The Sacramento Bee. (RT 1116).

Notwithstanding Mr. Noble's efforts in building circulation for The Sacramento Bee in Newsstand No. 5 Mr. Conklin admitted that prior to May 1969 he had suggested to Willard Noble that he split his territory. (RT 1059). Defendant Carlo Bua, assistant circulation manager of The Sacramento Bee, admitted that during various conversations with Mr. Noble he suggested to him that he should consider giving up a portion of his area.[2] (RT 837). Mr. Bua estimated the number of these conversations as five, six, or seven times. (RT 864). Mr. Bua admitted that on Saturday, May 24, 1969, the subject of splitting Mr. Noble's dealership came up during a telephone conversation between Mr. Noble and him (RT 865); that he suggested to Mr. Noble that he split Newsstand No. 5

[2]At his deposition on August 8, 1969 Mr. Bua testified under oath as follows:

"Q. Mr. Bua, have you at any time ever discussed with Mr. Willard Noble the splitting of his dealership.

A. No." (RT 860).

Mr. Bua admitted at trial making that answer but explained it as follows:

"A. I gave that answer but my answer would be to that, for I had never called Mr. Noble up on the telephone or asked him to come into the office for the specific purpose of splitting his area. The only time the question of splitting his territory ever came into the conversation was when we had a griping session." (RT 861).

(RT 866); and that Mr. Noble informed him that "under no circumstances would he want to split his distributorship." (RT 866-A).

Three days after this conversation, by letter dated May 27, 1969, Mr. Conklin, on behalf of McClatchy Newspapers, terminated plaintiffs' city newsstand distributor contract dated April 19, 1969 with a date of cancellation to be July 1, 1969. (Plts. Ex. 8, RT 869). Immediately thereafter Mr. Conklin commenced discussions with Gary C. Downing, an employee in the circulation department of The Sacramento Bee at the time, about the possibility of his becoming a city newsstand distributor in a portion of Mr. Noble's distributorship and not long afterwards notified Mr. Downing that he could be one of the two distributors to replace plaintiffs. (RT 1090-91). James P. Gallagher, Sacramento Bee distributor for Newsstand No. 2 at the time, approached Mr. Conklin "very shortly after the termination had been received by Mr. Noble" and according to Mr. Conklin, he emphatically told Mr. Gallagher "that if he was approved to take over the portion of Newsstand No. 5, that he could not continue as a distributor in Newsstand No. 2 for any length of time." (RT 1093-94). City newsstand distributor contracts were entered into with Gary and Judith Downing and James and Elizabeth Gallagher, effective July 1, 1969, for the distribution of The Sacramento Bee newspaper in plaintiffs' former territory. (Plts. Exs. 10, 12, RT 1097).

Mr. Carlo Bua, assistant circulation manager of The Sacramento Bee, testified that a few days after

plaintiffs received their termination notice, Mr. Conklin said to him, "Well, Carlo, now is the best time to split Newsstand 5. Let's work on a feasible split that we think would be profitable for those concerned and be equitable to each individual independent contractor for that area" (RT 876-77); that he suggested to Mr. Conklin that he be given the responsibility for making the split which was granted (RT 876); that on June 4, 1969, when Mr. Noble visited their offices he and Mr. Conklin informed Mr. Noble that they were splitting his distributorship (RT 873); and that at the close of the meeting he invited Mr. Noble into his office and showed him the map of the city newsstand distributorships and the split of his distributorship along Walnut Avenue. (RT 873-84).

Plaintiffs' expert on newspaper circulation department practices, Robert Gilliland, testified that it is in the best interest of circulation management to keep dealerships down to a limited size in circulation (RT 1283); that even in the case of an outstanding dealer "we would ultimately split the dealership" (RT 1283); and that "we kind of have a standing formula that an agency [i.e., dealership] of a certain size is desirable and when they reach a size larger than that, we find some way, if possible, to split it." (RT 1283). Mr. Gilliland testified that normally he would attempt to negotiate with a dealer to get him to mutually agree to a split but "there are times when this doesn't work and you have to find some means by which you can take legal action to split the area or, quite frankly, cancel the man who won't split it." (RT 1285).

Plaintiff Willard Noble testified that defendant Carlo Bua never gave any reasons in support of his suggestions that he split his territory (RT 1721); that he explained in detail to Mr. Bua why he felt he could do a better job with a larger territory than a split territory (RT 1719); that with a larger territory he had help to do the actual delivery which freed him to call on new prospective customers and allowed him to tend to his vending machine business and, which, also, provided additional income to buy more vending machines. (RT 1719-20). Mr. Noble testified that he refused defendants' suggestions to split his territory because:

> "I knew that as a small dealer, what I had experienced, working seven days a week and whether you're sick or well, and I knew that I had increased circulation and did a better job as a larger dealer. I felt I'd done a better job. And so I refused. I just—I didn't feel that this was going to accomplish anything." (RT 1722).

ARGUMENT

A. THE PETITION IS PREMATURE

The Court of Appeals below reversed the judgment of the District Court in favor of defendants and against plaintiffs on claim two, the termination claim, and remanded for a new trial because of erroneous instructions given the jury by the trial judge. The Court of Appeals held that under *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 the jury should have been

instructed that an agreement to restrict the territory in which newspapers purchased from defendant McClatchy Newspapers could be sold was a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1 and that it was error for the trial judge to treat territorial restrictions in the category of non *per se* offenses. *Noble v. McClatchy Newspapers,* 533 F.2d 1081, 1086. The case now goes back to the trial court for a new trial where the issue will be causation: Was a contributing factor to the termination of plaintiffs' distributorship their refusal to accede to defendants' request that they confine their sale of the Sacramento Bee to a portion of Newsstand No. 5, as plaintiffs contend? *Mulvey v. Samuel Goldwyn Productions,* 433 F.2d 1073, 1075 (9th Cir.).

Since the case must go back to the trial court for further proceedings "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.R. Co.,* 148 U.S. 372, 384. See *Youngstown Co. v. Sawyer,* 343 U.S. 579, 584-85; *Cobbledick v. United States,* 309 U.S. 323, 324-25; *Hamilton-Brown Shoe Co. v. United States,* 240 U.S. 251, 258 (lack of finality "of itself alone furnished sufficient ground for the denial"); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.,* 389 U.S. 327 ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

B. AN ALTERNATIVE GROUND FOR DECISION EXISTS

In the District Court the jury returned a verdict for defendants on claim two (the termination claim) and four (the monopolization claim), and for plaintiffs on claim three (the sale of business claim). Judgment was entered in favor of plaintiffs on the sale-of-business claim in the amount of $63,333.04—$15,000 in damages, trebled, costs and attorneys' fees of $18,333.04. Defendants' motion for judgment n.o.v. or a new trial on the sale-of-business claim was denied by the trial judge. *Noble v. McClatchy Newspapers,* 533 F.2d 1081, 1082-83.

The defendants appealed the judgment of the District Court. The plaintiffs filed a notice of cross appeal requesting the Court of Appeals to review, pursuant to F.R.Civ.P. 50(d), certain issues only in the event the judgment of the District Court in favor of plaintiffs was set aside.

Since the filing of defendants' petition for a writ of certiorari plaintiffs have filed a cross-petition for a writ of certiorari. *Willard M. Noble, et al. v. McClatchy Newspapers, et al.,* Docket No. 76-242, October Term, 1976. This cross-petition pertains to the Court of Appeals' reversal of the judgment of the District Court in favor of plaintiffs and against defendants on the sale-of-business claim.

In the event this Court grants plaintiffs' cross-petition for a writ of certiorari, reverses the court of appeals and reinstates the judgment of the District Court in favor of plaintiffs then it will not be necessary for this Court to reach the points raised by the

petition herein. See *Fashion Hosiery Mills v. N.L.R.B.*, 344 U.S. 863; *The Allegheny, Inc. v. Mayer,* 339 U.S. 965. Plaintiffs urge that this be the course of action herein.

C. INTERSTATE COMMERCE ISSUE NOT RAISED BY DEFENDANTS BELOW

In their petition defendants contend that "the decision below holds that, if the restraint is unreasonable because it is of a type deemed unreasonable *per se,* the second requirement—that the restraint be in or affect interstate commerce—vanishes." (Petition, p. 9). This is not correct. In its decision the Court of Appeals never discusses interstate commerce requirements because defendants never raised them in respect to the termination claim.[3]

The Opening Brief of Defendants-Appellants in the Court of Appeals, filed on or about January 10, 1973, dealt with both defendants' appeal and plaintiffs' cross-appeal. On pages 23-24 and in the Appendix of that brief defendants argued that plaintiffs were not entitled to a new trial on the second (termination) claim. Nowhere did defendants advance the argument that plaintiffs had failed to establish that the territorial restraint was not in or affected interstate commerce.

After the Court of Appeals rendered its decision on November 14, 1975, defendants had the opportunity,

[3]The only interstate commerce issue raised by defendants in the Court of Appeals was in respect to claim three, the sale of business claim. 533 F.2d, at 1085, fn.9.

pursuant to F.R.App.P. 40, to file a petition for rehearing with the Court of Appeals bringing to its attention any matter which it overlooked—such as the interstate commerce issue. Defendants filed no petition for rehearing with the Court of Appeals. The petition for rehearing filed with the Court of Appeals was by plaintiffs directed to the sale of business claim.

Defendants' arguments regarding interstate trade and commerce must properly arise in the record *(Tyrrell v. District of Columbia,* 243 U.S. 1) and must have been urged and briefed below *(California v. Taylor,* 353 U.S. 553, 557, n.2; *Lawn v. United States,* 355 U.S. 339, 362, n.16; *Neely v. Eby Construction Co.,* 386 U.S. 317, 330). This the defendants did not do.

D. THERE ARE NO CONFLICTS BETWEEN THIS COURT AND THE COURT OF APPEALS ON THE INTERSTATE COMMERCE ISSUE

Because the defendants did not raise the interstate commerce issue in respect to the territorial claim, claim two, the Court of Appeals assumed, as it should, that plaintiffs met their evidentiary burden that the subject restraint operated in or affected interstate commerce. *Goldfarb v. Virginia State Bar,* 421 U.S. 773. As set forth in the statement of the case of this brief, plaintiffs met this evidentiary burden.

In the enactment of Section 1 of the Sherman Anti-Trust Act Congress " 'wanted to go to the utmost extent of its constitutional power in restraining trust

and monopoly agreements. . . .'" *Gulf Oil Corp v. Copp Paving Co.,* 419 U.S. 186, 195 quoting *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 558.

The Sherman Act extends not only to transactions in the stream of interstate commerce (the "in" commerce theory), but also to intrastate transactions which affect interstate commerce (the "affect" commerce theory). *United States v. Chrysler Corp. Parts Wholesalers,* 180 F.2d 557, 560 (9th Cir.); *Las Vegas Merchant Plumbers Ass'n v. United States,* 210 F.2d 732, 739 (9th Cir.). An effect on interstate commerce is present whether the restraints are applied before the interstate journey begins or after it ends. *Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211; *Eastern States Retail Lumber Dealers v. United States,* 234 U.S. 600.

"'[W]holly local business restraints can produce the effects condemned by the Sherman Act.'" *Hospital Building Co. v. Trustees of Rex Hospital,* 96 S.Ct. 1848, 1852 quoting *United States v. Employing Plasterers Ass'n,* 347 U.S. 186, 189. "'If it is interstate commerce that feels the pinch, it does not matter how local the operation which applied the squeeze.'" *Gulf Oil Corp. v .Copp Paving Co., supra* at 195, quoting *United States v. Women's Sportwear Mfgs. Ass'n,* 336 U.S. 460, 464.

It is well established that the *local* distribution of news and advertisements transmitted "in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading

public is an inseparable part of the flow of the interstate commerce involved." *Lorain Journal Co. v. United States,* 342 U.S. 143, 151. See *Albrecht v. Herald Co.,* 390 U.S. 145. Thus, plaintiffs' distribution and sale of The Sacramento Bee newspaper is an inseparable part of the flow of news, feature materials, comics and other information which defendants have admitted "is regularly gathered from all parts of the United States and from foreign countries and is distributed and delivered by various means in interstate and foreign commerce to the Sacramento Bee." Likewise, plaintiffs' distribution and sale of The Sacramento Bee newspaper is an inseparable part of the flow of advertising which defendants admit constitutes "a continuous flow in interstate commerce of advertising contracts, copy and payments between advertisers and the Sacramento Bee."

Like the fixing of newspaper distributors' maximum resale prices in *Albrecht v. Herald Co., supra,* the fixing of distributors' territories operates on (the "in" commerce theory) and affects (the "affect" commerce theory) the flow of news, feature materials, comics and other information in interstate and foreign commerce. In *Burke v. Ford,* 389 U.S. 320, 321-22, the Court held:

> "Horizontal territory divisions almost invariably reduce competition among the participants. . . . When competition is reduced, prices increase and unit sales decrease. The wholesalers' territorial division here almost surely resulted in fewer sales to retailers—hence fewer purchases from out-of-state distillers—than would have occurred

had free competition prevailed among the wholesalers."

And as held in *Cooper Liquor Co., Inc. v. Adolph Coors Co.,* 506 F.2d 934, 948 (5th Cir.) the effects upon interstate commerce ascribed to horizontal division of territories in *Burke* are equally attributable to vertically imposed restrictions.

E. THERE ARE NO CONFLICTS BETWEEN THIS COURT AND THE COURTS OF APPEALS ON THE PER SE ILLEGALITY OF TERRITORIAL RESTRICTIONS

The Court of Appeals in this case refused to depart from the well established rule that it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 379. The defendants seek an exemption from this rule for newspaper publishers. For the reasons stated below there is no justification for such an exemption. *Noble v. McClatchy Newspapers, supra* at 1087-89. As exemption for highly perishable Coors beer, which must be refrigerated at all times, was rejected in *Adolph Coors Co. v. Federal Trade Comm'n,* 497 F.2d 1178, 1187 (10th Cir.).

Since the Court's decision in *Schwinn* this Court has consistently adhered to the *per se* illegality of territorial and customer restrictions. The defendants' contention (Petition, p. 16) that this Court did not follow this rule in *Federal Trade Comm'n v. Sperry & Hutchinson & Co.,* 405 U.S. 233 is incorrect. There the Federal Trade Commission explicitly declined to assess S&H's conduct in light of the *Schwinn* holding. However, this Court reaffirmed the holding of *Schwinn.* 405 U.S., at 247, fn. 6. And in *United States v. Topco Associates, Inc.,* 405 U.S. 596 this Court continued to reaffirm the vitality of *Schwinn.*

Defendants' contention that the Ninth Circuit's *en banc* opinion in *GTE Sylvania, Inc. v. Continental TV, Inc.,* ..... F.2d ....., 1976-1 Trade Cases ¶60,848 (9th Cir.) does not square with the decision below in this case is incorrect. (Petition, pp. 11, 12) In *GTE Sylvania* the majority opinion approves the result in this case. *Id.* at ....., fn. 42. And in the order on plaintiffs' petition for rehearing the Court of Appeals herein concluded that there was no inconsistency between the language in *GTE Sylvania* and in the November 14, 1975 opinion in this case. *Noble v. McClatchy Newspapers, supra* at 1091-92. *GTE Sylvania* dealt with location clauses, not territorial or customer restrictions.

Defendants' reliance upon *Williams v. Independent News Co.,* 485 F.2d 1099 (3rd Cir.) as a source of conflict among the circuits is also not well taken. (Petition, p. 16) There the Third Circuit upheld the *per se* illegality of territorial restrictions. 485 F.2d, at 1103. Defendants' reliance on *Tripoli v. Wella Corp.,* 425 F.2d 932 (3rd Cir.) as a source of conflict among the circuits is also not well taken since that case did not deal with territorial restrictions but a prohibition against the sale of potentially hazardous beauty prod-

ucts to persons who were not licensed by the state as barbers and beauticians.

There is no question that the rule of *Schwinn* is firmly established and settled in the law.

F. THERE ARE NO CONFLICTS BETWEEN THE COURTS OF APPEALS ON NOT ADVISING THE JURY THAT IT IS THE FUNCTION OF THE COURT TO TRIPLE THE DAMAGE AWARD OF THE JURY

The Court of Appeals in this case held that it was error for the Court to inform the jury that "it is the function and duty of the Court in the event that you should award damages to treble that amount in the judgment." *Noble v. McClatchy Newspapers, supra* at 1090. The decision below followed the decision of the 10th Circuit in *Semke v. Enid Automobile Dealers Ass'n,* 456 F.2d 1361, 1370 and the 5th Circuit in *Pollock & Riley, Inc. v. Pearl Brewing Co.,* 498 F.2d 1240, 1242-43.

In respect to defendants' argument that jury confusion will result without informing them of the fact that the damages will be trebled, this was answered by the Court of Appeals in *Pollock & Riley, Inc. v. Pearl Brewing Co., supra* at 1243:

> "The basic point urged against this holding is jury confusion. It is asserted that the treble damage feature of the anti-trust law has been publicized enough so that jurors might have some knowledge of it. The argument goes that a little knowledge without a complete explanation from the court will result in totally erroneous verdicts

> and damage awards. Our immediate reaction is that a district court can sufficiently instruct the jury to determine only *actual* damages. In those cases where an accidental revelation occurs, the court can give curative instructions to alleviate confusion."

As to defendants' contention that *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.,* 203 F.2d 676 (2d Cir.) is in conflict with the above decisions (Petition, p. 18) this is not correct. The special circumstances of the *Bordonaro Bros.* case do not create a real direct conflict in the circuits. There, based upon a prior action and the trial court's appropriate ruling as to the effect of the judgment there entered, as well as the fact that the matter of treble damages got into evidence, made the giving of an instruction on treble damages not erroneous. 203 F.2d, at 678-79.

In the instant case the trial court entered an order at the beginning of trial prohibiting counsel and the parties from mentioning treble damages. It was only at the conclusion of the trial, in the trial court's jury instructions and in counsel's closing argument, that this order was lifted. Thus, this case is different from the *Bordonaro Bros.* case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

G. JOSEPH BERTAIN, JR.,
TIMOTHY H. FINE,
50 California Street, Suite 955,
San Francisco, California 94111,
Telephone: (415) 981-4938,
Attorneys for Respondents.

August 18, 1976.

In the Supreme Court of the United States

No. 76-86

McCLATCHY NEWSPAPERS, a corporation; ELEANOR McCLATCHY; C. K. McCLATCHY; BYRON CONKLIN; and CARLO BUA,

Petitioners,

vs.

WILLARD M. NOBLE and ETTA M. NOBLE,

Respondents.

Petitioners' Reply Brief

MOSES LASKY
RICHARD HAAS
GEORGE A. CUMMING, JR.
111 Sutter Street
San Francisco, Calif. 94104
Telephone: (415) 434-0900
Attorneys for Petitioners

Of Counsel:
BROBECK, PHLEGER & HARRISON
111 Sutter Street
San Francisco, Calif. 94104
Telephone: (415) 434-0900

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Respondents.

Petitioners' Reply Brief

The significant fact about respondents' brief in opposition[1] is that (1) it does not contest that the questions proferred by the petition are present, (2) it does not deny that they are important, and (3) it does not attempt to support the answers given to those questions by the Court of Appeals. Instead it seeks to deflect attention from the questions, essentially by three contentions.[2]

The first contention is that the petition is "premature," because the new trial ordered by the court below has not yet occurred (R. Br. p. 11). But that was the posture in *Gulf Oil Corporation*

1. Hereafter referred to as "R. Br.".

2. Other contentions have already been dealt with in our petition and we therefore do not discuss them here.

v. Copp Paving Company, 419 U.S. 186 (1974) and numerous other cases[3] where the Court has granted certiorari. Not only are the issues "fundamental to the further conduct of the case", but, more important, the situation is not one where the questions presented by the petition are of concern to this case alone. Here the Court of Appeals has announced erroneous rules of antitrust law of widespread application, and the whole justification of certiorari jurisdiction is to review questions of such magnitude. Should this Court not intervene, the opinion below will remain in the books; each of the fourteen district courts in the Ninth Circuit will be required, in other antitrust cases, to instruct in conformity with that decision; and all the courts in other circuits will be implored to do so. It can not be "premature" to give guidance to those district courts and to avoid numerous protracted trials of antitrust cases on the instructions mandated by the Court of Appeals.

In a similar vein, respondents suggest that the Court not reach the important questions raised by the petition, because, so they argue, there is an "alternative" ground on which the judgment below can be sustained. If there are other grounds upon which to reach the same judgment, they can be presented to the court below for its consideration on remand. No such grounds were stated by that court or appear in its opinion, and the problem now is to sweep out of the books the incorrect reasoning on which it proceeded lest it infect jurisprudence.

Finally, respondents make the inexplicable assertion that the interstate commerce issue was not raised below (R. Br. p. 14). By judicial decision the words, "in restraint of trade or commerce" of Section 1 of the Sherman Act have the double meaning of restraint *in* commerce and restraint *affecting* commerce. The trial

3. *E.g., U.S. v. General Motors Corp.,* 323 U.S. 373, 377 (1945); *Land v. Dollar,* 330 U.S. 731, 734, n. 2 (1947); *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 685, n. 3 (1949); *Gillespie v. U.S. Steel Corp.,* 379 U.S. 148, 153 (1964).

court instructed the jury that it could not return a verdict for plaintiffs unless it found that "an unreasonable restraint of interstate commerce would have resulted." The court below held this to be erroneous because the restraint was a *per se* one and therefore an effect on commerce was presumed. It held that the trial court also erred in declining to instruct the jury that "it is unnecessary for plaintiffs to prove that there has been a restraint of interstate trade and commerce as the result of such restriction—it is presumed" (See petition, p. 6). Thus the trial court was reversed because it did not instruct the jury that plaintiff need not prove *either* that the restraint was *in* commerce or that it *affected* commerce. This was the very issue briefed and argued.

In their opening brief below, respondents, there appellants, stated, as the very first "issue presented for review" (at pp. 1-2):

> "1. Did the trial court commit reversible error when it instructed the jury on plaintiffs' second claim pertaining to vertically imposed territorial restrictions upon the resale of a product by a manufacturer after it had parted with ownership of the product, that it was the duty of the jury to determine whether such restrictions result in an unreasonable restraint of interstate trade and commerce and refused to give plaintiffs' instructions that such restrictions constitute a *per se* violation of Section 1 of the Sherman Act and are presumed to be an unreasonable restraint of interstate trade and commerce?"

The same brief collected the instructions given by the trial court (App. B.),[4] and argued (p. 22) that they "did not conform to the status of the law . . . and that the trial court should have given plaintiffs' instructions that such restrictions constitute a *per se* violation . . . *and are presumed to be an unreasonable restraint of trade and commerce.*" (Emphasis supplied). Appendix

4. One of which included this:
"The first question is whether there is any restraint on interstate commerce."

C to the same brief assembled the rejected instructions, including those appearing at pages 39-40 of the appendix to our petition for certiorari. Among these was the proposed instruction reading:

> "Because a vertically imposed restriction upon the resale of a product by a manufacturer after it has parted with ownership of it is a *per se* violation of Section 1 of the Sherman Act it is unnecessary for plaintiffs to prove that there has been a restraint of interstate trade and commerce as a result of such restriction—it is presumed."

Petitioners in their brief below responded to these arguments and submitted that the trial court was "dead right" in giving respondents' instructions and in refusing the "presumed restraint" instruction urged by respondents.[5]

CONCLUSION

We respectfuly submit that the petition for certiorari should be granted.

Dated: San Francisco, California, October 1, 1976

MOSES LASKY
RICHARD HAAS
GEORGE A. CUMMING, JR.
Attorneys for Petitioners

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5. Under the heading "There was No Restraint of, or Affecting Interstate Commerce", petitioners' opening sentence in their brief below was:

> "The business of distributing the Sacramento Bee newspaper in a twenty-mile area around Sacramento was not in interstate commerce [citations] and it had no effect of any kind on commerce."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-86

MCCLATCHY NEWSPAPERS, a corporation; ELEANOR MCCLATCHY; C. K. MCCLATCHY; BYRON CONKLIN; and CARLO BUA, *Petitioners,*

v.

WILLARD M. NOBLE and ETTA M. NOBLE, *Respondents*

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

ARTHUR B. HANSON
MITCHELL W. DALE
HANSON, O'BRIEN, BIRNEY AND BUTLER
888 17th Street, N.W., Suite 1000
Washington, D. C. 20006
Attorneys for Amicus Curiae American Newspaper Publishers Association

Of Counsel:

S. CHESTERFIELD OPPENHEIM
Washington, D. C.

14811-9-76

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

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MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter "ANPA") respectfully moves this Court for leave to file the accompanying Brief Amicus Curiae in support of the Petition for Writ of Certiorari filed herein. The Petitioners have consented to ANPA's

filing of a Brief Amicus Curiae; the Respondents have declined to do so.

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,170 newspapers representing over ninety percent of the total daily and Sunday newspaper circulation and a portion of the weekly newspaper circulation in the United States.

The Sacramento Bee, The Fresno Bee, The Modesto Bee—all owned by Petitioner McClatchy Newspapers —and sixty other newspapers throughout the State of California hold membership in ANPA.

Concerned with matters of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members abreast of matters touching these concerns. In that regard, the Association's member newspapers, individually and through ANPA, are vitally interested in the basic issue presented herein. That issue is whether a publisher may utilize independent contractors as distributors, to each of whom the publisher unilaterally and vertically assigns a specifically designated area of primary responsibility. Over ninety percent of ANPA's member newspapers, including Petitioner McClatchy Newspapers, use that method of distribution. Its main lawful purpose is to assure speedy, orderly and non-duplicative widespread circulation of their daily newspapers, upon which their advertising revenue, the lifeblood of the newspapers, depends. Most ANPA member newspapers do not have the resources to use the alternatives of distribution through consignment, agency, or vertical integration with use of their employees and their own outlets.

As Amicus, ANPA desires to present to the Court, for its assistance, its views on the following substantial federal questions fully discussed in the attached Brief Amicus Curiae:

(1) Whether the Court of Appeals erred by interpreting the Court's rationale in *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), as automatically declaring illegal per se all vertical restraints on distribution after title and dominion passes in sales transactions, on which there have been conflicting decisions in both the Courts of Appeals and in the District Courts.

(2) Whether the Court of Appeals should have applied a Rule of Reason inquiry into the inherent unique characteristics which make the nature, purpose, functions and effects of the independent contractor distribution system of marketing daily newspapers radically different from the marketing of industrial products.

(3) Whether the Court of Appeals erred in applying the per se *Schwinn* rule without any consideration or finding that the termination of Respondents' distributorship, the conduct complained of, substantially affected interstate commerce.

On the foregoing issues this is an antitrust newspaper case of first impression.

WHEREFORE, American Newspaper Publishers Association respectfully requests this Court to grant this

Motion and permit the filing of the Brief Amicus Curiae attached hereto and submitted herewith.

Respectfully submitted,

ARTHUR B. HANSON
MITCHELL W. DALE
HANSON, O'BRIEN, BIRNEY AND BUTLER
888 17th Street, N.W., Suite 1000
Washington, D. C. 20006
Attorneys for Amicus Curiae American Newspaper Publishers Association

Of Counsel:

S. CHESTERFIELD OPPENHEIM
Washington, D. C.

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v.

WILLARD M. NOBLE and ETTA M. NOBLE, *Respondents*

BRIEF OF AMICUS CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

American Newspaper Publishers Association (hereinafter "ANPA") submits this brief *amicus curiae* in support of Defendants McClatchy Newspapers, Eleanor McClatchy, C. K. McClatchy, Byron Conklin and Carlo Bua, in their Petition for Writ of Certiorari.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1170 newspapers representing over ninety percent of the daily and Sunday newspaper circulation and a portion of the weekly newspaper circulation in the United States.

Three daily newspapers owned by Petitioner McClatchy Newspapers, as well as sixty other newspapers published throughout the state of California, hold membership in ANPA. Concerned with issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members informed of, and to provide meaningful input on, matters touching on these concerns.

In that regard, the Association's member newspapers, individually and through ANPA, are ever vigilant to safeguard the means of distribution of their newspapers. Distribution is aimed at promoting circulation upon which advertising patronage and advertising revenue, the lifeblood of a daily newspaper, depend. Among the journalistic press functions fostering the goal of the First Amendment is competition in the dissemination of news and advertising. These are services the public has the right to have while the information is of current significance. This time perishability of daily newspapers, as will be shown in detail *infra,* makes the speedy, orderly and efficient marketing of the daily newspapers indispensable to their economic survival.

ARGUMENT

The Court of Appeals' Decision and Opinion Erred in Misinterpreting This Court's Rationale in Schwinn as Automatically Declaring Illegal Per Se All Vertical Restraints on Distribution After Purchase and Sale Transactions.

In *Willard M. Noble and Etta M. Noble* v. *McClatchy Newspapers et al.,* 533 F.2d 1081 (9th Cir. 1975), *rehearing denied May 20, 1976,* the Court of Appeals held that McClatchy had imposed territorial restrictions upon the plaintiffs which the jury should have been instructed were per se unreasonable under the ruling of this Court in *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967). Accordingly, the District Court's judgment for defendants was reversed. The case was remanded for a new trial on plaintiffs' claim that their distributorship was terminated, in substantial part, because plaintiffs refused to comply with defendants' request that they give up part of the territory covered by their distributorship.

One root error of the Court of Appeals was its failure to note that there was no record evidence from which the jury could have found that there was in fact an express or tacit territorial restriction in the contract between McClatchy and the Nobles. On its particular facts, the contract merely imposed on the distributor of McClatchy's Sacramento Bee, a daily evening and Sunday paper, the primary obligation to exert his best efforts to distribute the newspapers in a designated geographic area. This area was called "Newsstand 5", which covered a part of the city of Sacramento and suburban towns within twenty miles of Sacramento.

In substance and effect this vertical restraint was merely the designation of an "area of primary respon-

sibility" which has been sustained by federal courts against contentions that they are banned by *Schwinn's* illegal per se prohibition. In *GTE Sylvania, Inc.* v. *Continental T.V., Inc.,* 1976-1 Trade Cas. ¶ 60,848 (9th Cir. 1976), the majority opinion of the Court of Appeals, sitting *en banc,* defined an area of primary responsibility clause in footnote 25 as

> "... basically an agreement obligating a distributor to concentrate his sole efforts in a specified geographical area for which he is primarily responsible."

The majority cited the following cases as approving a primary responsibility clause, in which a seller's legitimate main purpose and interest is to have his goods or services distributed effectively within the designated area, so long as there is no added anticompetitive restraint: *Colorado Pump & Supply Co.* v. *Febco, Inc.,* 472 F.2d 637 (10th Cir. 1973), *cert. denied,* 411 U.S. 987 (1973); *Superior Bedding Co.* v. *Serta Associates,* 353 F. Supp. 1143 (N.D. Ill. 1972). The lawfulness of area of primary responsibility covenants has also been recognized in various consent decrees, *e.g., United States* v. *Bostitch, Inc.,* 1958 Trade Cas. ¶ 69,207 (D.R.I.), *United States* v. *Rudolph Wurlitzer Co.,* 1958 Trade Cas. ¶ 69,011 (W.D.N.Y.), cited by Justice Brennan in his concurring opinion in *White Motor Co.* v. *United States,* 372 U.S. 253 at 272, n. 12. The final decree in *Schwinn* sanctioned areas of primary responsibility and permitted *Schwinn* to terminate distributors who fail adequately to represent *Schwinn* in their designated area, 291 F. Supp. 564, 565-66 (N.D. Ill. 1968).

In *McClatchy,* the Nobles were not restrained from selling the Sacramento Bee to any potential purchaser

located outside the designated Newsstand 5 area or who might come into that area. The Court of Appeals in *McClatchy* nevertheless cryptically said "There is no magic in the label 'area of primary responsibility'." 533 F.2d at 1089. This unwarranted disregard of the substance of such a lawful covenant stems from the court's literal application of the language in *Schwinn* that once a seller parts with title and dominion over his product, the illegal per se rule automatically condemns all vertical restraints.

Furthermore, McClatchy acted unilaterally in contracting with the Nobles and each of its other distributors in assigning specified geographic areas of primary responsibility. There was no element of combination or conspiracy or any horizontal illegal per se restraint. Nor was there any evidence of anticompetitive purpose or effect.

In *GTE Sylvania, Inc.* v. *Continental T.V., Inc., supra,* the majority Court of Appeals, sitting *en banc,* reversed the District Court which literally applied the illegal per se rule of *Schwinn* to a "location clause" in a franchise agreement. The majority held that the confinement of authorized franchisees to specified locations should have been considered by the jury under a rule of reason instruction.

Your Amicus perceives no difference in either the effect or in the main lawful purpose of a location clause and an area of primary responsibility clause, as used in *McClatchy.* In both types of clauses, the independent distributor or dealer is not prevented from selling to customers elsewhere. A location clause merely requires such sales to be made from an authorized outlet. The Final Decree in *Schwinn* permitted

designation of the location of the place of business for which the franchise is issued. 291 F. Supp. 564, 565-66 (N.D. Ill. 1968).

While your Amicus concurs in the majority's decision in *GTE*, we are puzzled by the majority's statement that it has no quarrel with the result reached by the same circuit's panel in *Noble* v. *McClatchy,* supra, which applied the per se rule of *Schwinn* by ignoring the difference between a naked territorial restriction forbidding sales to customers outside the territory and an area of primary responsibility. That error applies to both area of primary responsibility and location clauses and the rule of reason therefore should also have been applied in *McClatchy*. Perhaps that explains why the majority in *GTE* disapproved any language in *McClatchy* inconsistent with the majority's language in *GTE*. Nonetheless, your Amicus believes there is inconsistency in both the result and language between the *GTE* majority and *Noble* v. *McClatchy*.

The Court of Appeals Should Have Applied a Rule of Reason as the Only Appropriate Approach to an Inquiry into the Nature, Purpose, Functions and Effects of the Independent Distributor System of Marketing Daily Newspapers.

The basic position of your Amicus is that there are inherent unique differences between the publishing business related to the distribution of daily newspapers and the marketing of products or services of industrial enterprises. This question is of vital importance to ANPA member newspapers, over ninety percent of whom distribute their daily newspapers through small independent entrepreneurs. Your Amicus therefore presents for the consideration and assistance of this Court an analysis of the factors involved in that method

of marketing newspapers. This will reveal that the radically different facts of *Schwinn* are inapplicable to the distribution of daily newspapers.

Time Perishability of Daily Newspapers

A daily newspaper is unique in the fleeting time its news and advertising information remain current. It is therefore of paramount importance that the distribution of daily newspapers be timely made. A morning daily newspaper must be delivered to home subscribers before the conventional breakfast hour. The papers must also be on the newsstands and in retail outlets before people go to work. The evening newspapers likewise must be available on the newsstand and in retail outlets before the evening rush hours and delivered to home subscribers before dinner.

These built-in deadlines for the delivery of daily newspapers are radically unlike the marketing of industrial commodities. A daily newspaper is not a "commodity". This has been judicially recognized by the courts. The historic lineage of this view is attested by *Casey* v. *Male*, 72 N.J. Super. Ct. 288, 178 A.2d 249 (1962). The court there quoted *In re Capitol Publishing Co.*, 3 MacArthur 405 (D. Colo. 1877), to support its holding that a newspaper publisher's facility was not "a factory, workshop, mill or place where manufacture of goods is carried on." The court then quoted the following:

> "A newspaper has intrinsically no value above that of an unprinted sheet. Indeed, it has less value, considered intrinsically, as a mere article of merchandise. Its value to subscribers arises from the information it contains, and its profit to the publisher is derived, in great measure, from the advertising patronage it obtains by reason of the

> circulation of the paper induced by the enterprise and ability with which it is conducted. Neither in the nature of things, nor in the ordinary signification of the language, would a newspaper be called a manufactured article or its publisher a manufacturer."

Accord: State v. *Crouse,* 105 Neb. 672, 181 N.W. 562 (1921); *Advertiser Publishing Co.* v. *Fase,* 279 F.2d 636 (9th Cir. 1960).

Unlike industrial commodities, newspapers have no inventory stored for later sale. In sum, time perishability, deadlines in press runs, and timely delivery of daily newspapers are the realities of a newspaper distribution system. The added costs, burdens and risks incurred thereby are unique to the publication and dissemination of daily newspapers.

It is noteworthy that the Court of Appeals in *McClatchy* completely failed to comprehend the foregoing unique features of newspaper distribution. *Schwinn* and every case cited by the Court of Appeals except *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), had involved commodities. *Albrecht* is inapplicable because the St. Louis Globe-Democrat was found to have formed a combination with two other persons to force Albrecht to adhere to the newspaper's suggested maximum prices for the resale of the papers purchased by Albrecht from the Globe-Democrat, a question not in issue here. In *Albrecht,* the Court's reference to *Schwinn* was mere dictum.

In *McClatchy*, the Court of Appeals cited two beer distribution cases as rejecting the argument that speedy delivery of perishable products justified an exception to the *Schwinn* per se rule. *Adolph Coors Co.* v. *FTC,*

497 F.2d 1178 (10th Cir. 1974); *Fairfield County Beverage Distributors, Inc.* v. *Narragansett Brewing Co.,* 378 F. Supp. 376 (D. Conn. 1974). This further shows that the court was not cognizant of the fundamental differences between the marketing of commodities and the distribution of daily newspapers.

While constantly referring to "manufacturers" and "products", the Court of Appeals, addressing itself also to the distribution of daily newspapers in *McClatchy*, curiously stressed that there was "a significant incentive" to distribute through independent contractors as against the alternatives of marketing through employees, agents or consignees. The court said that "Use of independent distributors avoids the substantial investment, expense, and risk incident to alternative methods of distribution." 533 F.2d 1088-1089. Yet the practical advantages of the independent distributor method of distributing daily newspapers were swept under the cloak of the court's literal and mechanical interpretation of *Schwinn* as requiring publishers who use independent distributors "to accept the burdens of *Schwinn.*" *Id.* at 1088.

This indiscriminate application of *Schwinn* to all vertical restraints after title passes to the purchaser offers a Hobson's choice to the vast majority of ANPA member newspapers which utilize the independent distributor system. Only a few have the resources to convert their independent distributor method of distribution by vertical integration into a system of distribution through employees and their own outlets. Equally infeasible to most ANPA member daily newspapers would be conversion to an agency or consignment method of distribution, to be judged under

Schwinn by a "rule of reason" approach. *See* 533 F.2d at 1088 n. 19.

This brings us to a pivotal fact unique to the newspaper publishing business. In *Times-Picayune Publishing Co.*, v. *United States*, 345 U.S. 594 at 604 (1953), this Court took note of one of the fundamental realities of the newspaper publishing business in observing that

> "Advertising is the economic mainstay of the newspaper business . . . . Obviously newspapers must sell advertising to survive . . . ."

It is empirically established that usually seventy to eighty percent of the revenues of a daily newspaper are derived from advertising. See, for example, *Editor & Publisher*, April 6, 1963 at 15.

More important to an understanding of a daily newspaper's distribution system is the immutable interrelation between the volume of circulation of a newspaper and its advertising revenue. This unique behavioral characteristic is accentuated by the fact that the circulation volume generally establishes the value of the newspaper to advertisers whose patronage is directed toward a large readership among consumers of the advertised products or services. The bulk of the daily newspaper's advertising revenue is derived from local retail display advertising and local classified advertising. This has direct relevance to the local services of a newspaper's independent distributors whose functions in their respective areas of primary responsibility are essential to maintaining widespread circulation within their local submarkets.

In *Citizen Publishing Co.* v. *United States*, 280 F. Supp. 978 (D. Ariz. 1968), *aff'd*, 394 U.S. 131 (1969), the District Court at 985 set forth in Finding 68 the

interlock between circulation volume and advertising revenue in the following realistic terms:

> "The quality, circulation, and advertising revenues of a newspaper are interrelated. Generally, as the quality of a newspaper improves it receives wider public acceptance and its circulation increases. As the circulation increases, the newspaper becomes more attractive to merchants as an advertising medium and advertising revenues consequently increase. The increased revenues, in turn, enable the publisher to increase his expenditures on the news and editorial staff, wire services, and syndicated features and otherwise improve the quality of the newspaper. As a corollary to this process, it is to be expected that if the quality of the newspaper falls, there will be a loss of circulation to other publications, which will adversely affect newspaper advertising revenues, and a decline in advertising revenues will further adversely affect the quality of the newspaper, resulting in a further decline in circulation."

It is readily seen that an orderly, timely and nonduplicative distribution through independent distributors, in addition to the efficiency of direct cost savings, increases the local market penetration of the daily paper throughout its Retail Trading Zone.

This is a case of first impression. In no prior antitrust newspaper case has this Court had to determine whether the commercial operations pertaining to the independent distributor method of marketing daily newspapers requires a rule of reason approach to adjudication.

In our view the basic substantive issue in *McClatchy* merits reiteration. It is the legality of a vertical designation, by unilateral action of the newspaper publisher, of areas of primary responsibility, ancillary to

the main lawful purpose of assuring timely, orderly and quality service of delivery of newspapers, which, so to speak, are alive only on the day they are circulated.

The unique behavioral characteristics of daily newspaper marketing, which your Amicus has analyzed, make the illegal per se rule of *Schwinn* on territorial restraints after sale as inappropriate in *McClatchy* as it was in *White Motor Co.* v. *United States,* 372 U.S. 253 (1963). There Justice Douglas' majority opinion declared that the rule of reason was read into the Sherman Act as a rule of construction in the landmark opinion of this Court in *Standard Oil Co. of New Jersey,* 221 U.S. 1 (1911). That standard of reasonableness, the Justice said, "normally requires ascertainment of facts peculiar to the particular business." *White Motor* was also a case of first impression involving a territorial restriction about which the Court said it knew too little of its actual impact to condemn the practice as illegal per se.

This Court is so familiar with the historic common law roots of the reasonable ancillary restraints doctrine as an integral part of the rule of reason that your Amicus merely outlines the evolution of relevant judicial precedents. The distinction between vertical restraints ancillary to a main lawful purpose and non-ancillary horizontal restraints, which this Court has frequently and properly condemned as, by nature, conclusively presumed to be unreasonable per se, was first formulated by Chief Justice Taft (then Circuit Judge) in *United States* v. *Addington Pipe & Steel Co.,* 85 Fed. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899). Indeed, as Justice Stewart pointed out approvingly, in his opinion concurring in part in

Schwinn, as early as 1711, *Mitchell* v. *Reynolds,* 1 P. Wms. 181, 24 Eng. Rep. 347, recognized the legality of restraints on alienation that are ancillary to a legitimate business purpose. The passage in the notable opinion of Justice Brandeis in *Chicago Board of Trade* v. *United States,* 246 U.S. 231 at 238 (1918), setting forth the pertinent criteria governing the judicial technique of applying the rule of reason, has been frequently quoted by this Court. Among those criteria directly relevant here are "consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and the reasons for its adoption."

Nothing in this Amicus brief is intended to question this Court's repeated condemnation of the classic illegal per se horizontal agreements, combinations and conspiracies for which no justification can be shown. See, for example, Justice Black's opinion in *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 at 5 (1958), and the horizontal arrangement recently proscribed in *United States* v. *Topco Associates, Inc.,* 405 U.S. 596 (1972). This Court has not receded from that position. The record evidence in *McClatchy,* however, reveals that the vertical designation of areas of primary responsibility does not have a "pernicious effect on competition". On the contrary, it has the redeeming value of enabling the small independent newspaper distributors to survive. This Court has recognized Congress' intent to preserve the independent businessman. See *United States* v. *Von's Grocery Co.,* 384 U.S. 270, 275 (1966); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 344 (1972); *Standard Oil Co.* v. *United States,* 337 U.S. 293, 315-321 (1949). Your Amicus notes that the promotion of the self-interest of the newspaper and its

distributors or dealers do not alone immunize otherwise illegal conduct. Here, however, the record evidence does not reveal anticompetitive purpose or effects on the market.

This Court has not shrunk from applying the rule of reason approach merely because it requires an extended inquiry into the economic impact of a practice attacked as a violation of the Sherman Act. Apart from the horizontal arrangements conclusively presumed to be unreasonable per se, this Court has shown that it is equipped to undertake the task of weighing the various factors involved in a rule of reason approach in a case-by-case determination. In the newspaper publishing business, a per se illegality rule would be contrary to the policy of the Sherman Act. It would be completely at odds with the realities of the market behavior of daily newspaper distribution and the commercial and press functions it performs for the benefit of the readership.

The effect of the decision of the Court of Appeals in *McClatchy* being permitted to stand, namely, outlawing the independent contractor distribution of newspapers, would have devastating results in the daily newspaper publishing field. The system has been used by the great majority of daily newspaper members of ANPA over many decades. For most of these newspapers there are no feasible alternatives. Outlawing the system would ban the legitimate commercial objectives of preserving widespread local circulation, and its concomitant, necessary advertising revenues of daily newspapers. It would as well imminently and irreparably deprive the independent distributors of their customary way of earning a livelihood.

The Court of Appeals Erroneously Applied the Per Se Rule of *Schwinn* in the Absence of Any Consideration or Finding that the Termination of the Respondents' Distributorship Affected Interstate Commerce.

Your Amicus supports Petitioners' argument that the Commerce Clause of Section 1 of the Sherman Act required a finding that the termination by McClatchy of Noble's distributorship, the conduct complained of, substantially affected interstate commerce.

Interstate commerce is a jurisdictional requirement related to the subject matter of this suit. It is an issue that may be considered for the first time in the Court of Appeals, or in this Court, even if it was not, as Respondents erroneously assert, raised before the District Court. An objection to jurisdiction of the subject matter goes to the basic question of the power of a court to hear and decide a case, as duly authorized by statute. Lack of jurisdiction is a defense that cannot be waived by either party or ignored by the court. In *Rock Island Millwork Co.* v. *Hedges-Gough Lumber Co.*, 337 F.2d 24, at 27 (8th Cir. 1964), the court said: "The appellate court must satisfy itself not only of its own jurisdiction but also that of the district court".

As pointed out by Petitioners (see Petition pp. 16-17), the Court of Appeals in *McClatchy* regarded its application of the per se *Schwinn* rule as dispensing with the need for considering the jurisdictional requirement of interstate commerce.

As noted, Respondents erroneously state that the issue of interstate commerce was not raised in the court below. See Brief for Respondents in Opposition, pp. 14-18. To the contrary, Petitioners raised and briefed that issue by interposing it in opposition to the Re-

spondents' Claim Three: the sale of business claim, on which the Court of Appeals reversed judgment for Respondents. Petitioners' argument on the interstate commerce question was also addressed to the Respondents' claim that termination of their distributorship violated Section 1 of the Sherman Act.

Jurisdictionally, Section 1 of the Sherman Act comprehends only restraints "among the several states". There must be a sufficient nexus between the conduct complained of and interstate commerce. Two tests are generally enunciated in this Court and in lower federal courts. One is whether the restraint covers conduct within the flow of interstate commerce—the "in commerce" test. The other is whether the restraint involved conduct in itself wholly intrastate which nevertheless substantially affects interstate commerce.

Your Amicus recognizes that this Court, in certain newspaper antitrust cases under the peculiar facts of those cases, has held that where the commercial operations of daily newspapers involve complained of conduct, that conduct is an inseparable part of the flow of interstate commerce. Thus, for example, the combination or unit advertising rate of the newspaper, upheld in *Times Picayune Publishing Co.* v. *United States, supra,* was in the flow of interstate commerce of the paper. In *Albrecht* v. *Herald Co.,* 490 U.S. 145 (1968), where the majority of the Court held there was an unlawful combination to control the resale price of the paper, that conduct was also found to be inseparable from the interstate commerce of the paper. In *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951), the Lorain Journal refused to sell advertising to local merchants who advertised through a nearby radio station. The

Court held this was predatory conduct by the Lorain Journal, designed to drive the radio station out of business. Under this "in commerce" test, the amount of commerce in dollars or the percentage share of the market is not dispositive. Under the "affecting commerce" test, however, the wholly local or intrastate conduct must be shown to have a substantial effect on interstate commerce.

In *Page* v. *Work,* 290 F.2d 323 (9th Cir. 1961), *cert. denied,* 368 U.S. 875 (1961), the Court of Appeals held it was without jurisdiction because the legal advertising in the newspaper there involved was purely local, and directed wholly to a local intrastate market. The court announced a basic distinction in the test of jurisdiction, stating at 330:

> "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, *but that the conduct complained of affects the interstate commerce of such business.*" (Emphasis added.)

Nothing in this Court's unanimous ruling and opinion in *Hospital Building Co.* v. *Trustees of Rex Hospital et al.,* 1976-1 Trade Cas. ¶ 60,885 (1976), precludes a case-by-case determination on the commerce issue on the particular facts. It is especially important that the Court in footnote 9 said:

> "It may of course be that even though petitioner's complaint adequately alleges an effect on interstate commerce, further proceedings in this case will demonstrate that respondents' conduct involves no violation of law, or indeed no substantial effect on interstate commerce. Cf. *United States* v. *Oregon Medical Society,* . . . 343 U.S. 326 (1952)."

In *Oregon Medical,* the Court held that furnishing health insurance by a state-wide society of doctors was not interstate commerce for purposes of the Sherman Act.

The caveat in the quoted footnote 9, *supra,* in *Rex Hospital* is in keeping with the Court's admonition in *Maple Flooring Mfrs. Ass'n* v. *United States,* 268 U.S. 563, at 579-580 (1925) that

> ". . . each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of new cases to which the rule of earlier decisions is applied."

In *Rex Hospital* the facts are radically different from those in *McClatchy.* The holding in *Rex Hospital* was that, on respondents' motion to dismiss the complaint of Hospital Building, a fair reading of the complaint adequately alleged a restraint of trade substantially affecting interstate commerce. A dismissal on the pleadings was therefore held inappropriate.

Rex Hospital's motion to dismiss the complaint was made under Rule 12(b)(6) of the Federal Rules of Civil Procedure for plaintiff's failure to state a claim on which relief could be granted. This Court in footnote 1 of its opinion said:

> ". . . However, our analysis of the case would be no different, if we were to regard the District Court's action as having been a dismissal for want of subject matter jurisdiction under Rule 12(b)(6). In either event, the critical inquiry is into the adequacy of the nexus between respondents' conduct and interstate commerce that is alleged in the complaint."

This Court's opinion in *Rex Hospital* reveals that a "concededly rigorous standard" was applied to motions to dismiss a complaint preliminary to discovery or to a trial on the merits. In such circumstances, it is understandable that the Court took a broad view of the Congressional power over interstate commerce under the Sherman Act. That is why in cases cited by the Court the local business restraints were held to produce substantial adverse effects on interstate commerce. See *United States* v. *Employing Plasterers Ass'n,* 347 U.S. 186 (1954); *United States* v. *Women's Sportswear Mfrs. Assn.,* 336 U.S. 460 (1949), cited by the Court among other like factual situations. In *Rex Hospital* the Court added that the effects of a restraint may be indirect and not "purposely directed" toward interstate commerce. It further stated that the lack of effect on price is not of great relevance and that the impact on interstate commerce may fall "far short of causing enterprises to fold or affecting market price".

It should be kept in mind that in *McClatchy* there was a trial before the District Court, with a jury instructed by the court, followed by cross-appeals to the Court of Appeals. The material facts of *McClatchy* are also entirely different from those taken as true by this Court in *Rex Hospital,* in reviewing a dismissal on the pleadings.

Your Amicus now turns to the particular facts of *McClatchy* related to the termination of the Respondents' distributorship. The Sacramento Bee, as in the case of daily ANPA member newspapers generally, was itself engaged in interstate commerce. In the typical

situation, a daily newspaper uses news services such a AP or UPI, purchases newsprint and other supplies originating outside the state, and contracts for syndicated features, comics, and the like that come from outside the state. Respondents' termination claim, however, the very conduct complained of, relates *solely to the line of commerce* in the purely local distribution by Noble of the Bee in the specified geographic area called Newsstand 5. That is the only relevant submarket involved in the termination claim.

After the termination issue was tried in the District Court and on cross-appeals, the Court of Appeals ignored the jurisdictional issue of interstate commerce. This it did on the erroneous assumption that application of the per se illegality rule of *Schwinn* automatically coalesced and equated the issue of violation with an unreasonable per se restraint in interstate commerce. The Court of Appeals neither considered nor made a finding on interstate commerce as a jurisdictional requirement.

The record evidence in *McClatchy* shows that the termination of Respondents' distributorship had no effect at all on the interstate commerce of the Sacramento Bee. Therefore, the termination could not have had any substantial adverse effects on the newspaper's interstate commerce. On termination of Respondents' distributorship, *McClatchy* immediately and unilaterally split the Newsstand 5 area, and assigned a designated part to each of two independent distributors in individual vertical relations with each of them.

Neither of the new distributors had any connection with the termination of Respondents' distributorship. Each of them voluntarily and individually accepted the

area of primary responsibility offered him after termination of the Respondents' distributorship. Furthermore, no combination or conspiracy can be sustained against McClatchy acting unilaterally because of the prevailing view in *Nelson Radio & Supply Co.* v. *Motorola Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). *Nelson Radio* holds that a corporation cannot conspire with itself, and can act only through its officers, agents or employees in the management and control of its business. Among the defendants named in Respondents' complaint are two employees and three officers of McClatchy Newspapers. They clearly cannot be deemed conspirators under *Nelson Radio*. The defendants Downing and Gallagher, the new distributors, were also not conspirators because they contracted with McClatchy after Respondents were terminated. They had no connection whatsoever with the disputed termination.

The Sacramento Bee was distributed by independent distributors only within the State of California. The commerce involved with respect to the conduct complained of by Respondents was therefore purely local as in *Page* v. *Work, supra* and in *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969). The distribution of the Bee continued after termination of the Respondents' distributorship as before the termination except that the specified geographic area was split between the two new distributors. That wholly local distribution had no effect, and clearly no substantial effects, on any of the Bee's interstate commerce in newsprint, ink or any other products or services originating outside the State of California.

It is therefore irrelevant to the Respondents' claim of unlawful termination what constitutes the relevant

submarket of the Sacramento Bee. If that were relevant, your Amicus would support the position that the daily newspaper constitutes a submarket distinct from the broadcast media. This was the holding in *Citizen Publishing Co.* v. *United States,* 280 F. Supp. 978 (D. Ariz. 1968), *aff'd,* 394 U.S. 131 (1969), and *United States* v. *Times-Mirror Co.,* 274 F. Supp. 606 (D. Cal. 1967), *aff'd per curiam,* 390 U.S. 712 (1968). Our analysis shows that the submarket of the Bee involving interstate commerce is totally irrelevant because the only line of commerce involved on the termination is the wholly local distribution of the Bee in the local Newsstand 5 area originally designated for Respondents and later split within the same designated area for the new distributors replacing Respondents.

Your Amicus sees no need for burdening this Court with repetition of the circumstances related to the termination of Respondents' distributorship set forth by Petitioners, which your Amicus adopts and supports. Suffice it to add that, in the absence of any element of anticompetitive purpose or effect, or any other conduct violative of the Sherman Act, the termination of the Respondents' distributorship falls squarely within *United States* v. *Colgate & Co.,* 250 U.S. 300 (1919). There the Court announced its landmark ruling of the long recognized right of a private business firm to select, by free exercise of its independent discretion, the persons with whom it chooses to deal, or continue to deal, for business reasons sufficient unto itself. That is precisely the right exercised by McClatchy Newspapers in terminating Respondents' distributorship. *See Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970); *Ricchetti* v. *Meister Brau,*

Inc., 431 F.2d 1211 (9th Cir. 1970), *cert. denied,* 401 U.S. 939 (1971); *Bushie* v. *Stenocord Corp.,* 460 F.2d 116 (9th Cir. 1972).

Furthermore, the termination was made pursuant to the provision in the contract between McClatchy and Respondents, that the distributorship "may be cancelled by either party at any time upon thirty days prior written notice to the other party". McClatchy gave the Respondents the required notice of cancellation by letter thirty days prior to that termination.

In the role of an amicus, we also felt it was not necessary to discuss cases revealing the conflict in both the Circuit Courts of Appeals and among the District Courts regarding the per se rule pronounced in *Schwinn* and set forth in the Petitioners' brief.

For the reasons stated herein, it is respectfully urged that this Court grant the Petition for Writ of Certiorari in order that the substantial federal questions of antitrust law raised therein and herein be fully examined and adjudicated.

Respectfully submitted,

ARTHUR B. HANSON
MITCHELL W. DALE
HANSON, O'BRIEN, BIRNEY AND BUTLER
888 17th Street, N.W., Suite 1000
Washington, D. C. 20006
Attorneys for Amicus Curiae American Newspaper Publishers Association

Of Counsel:

S. CHESTERFIELD OPPENHEIM
Washington, D. C.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-86

McCLATCHY NEWSPAPERS, a corporation; ELEANOR McCLATCHY; C. K. McCLATCHY; BYRON CONKLIN; and CARLO BUA,
Petitioners,

vs.

WILLARD M. NOBLE and ETTA M. NOBLE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

G. JOSEPH BERTAIN, JR.,
TIMOTHY H. FINE,
50 California Street, Suite 955,
San Francisco, California 94111,
Telephone: (415) 981-4938,
Attorneys for Respondents.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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BRIEF FOR RESPONDENTS IN OPPOSITION TO MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42(3) of the Revised Rules of the United States Supreme Court, Willard and Etta Noble, Respondents, file this brief in opposition to motion filed by the American Newspaper Publishers

Association ("ANPA") for leave to file brief *amicus curiae.*

I.

GROUNDS FOR OPPOSITION

The grounds upon which Respondents oppose the motion of the ANPA are:

(1) That the motion of ANPA does not comply with the requirements of Rule 42(3) of the Revised Rules of the Supreme Court; and

(2) That ANPA has misunderstood the case in a manner indicating its unfamiliarity with the trial record.

II.

ARGUMENT

A. THE MOTION FILED BY ANPA DOES NOT COMPLY WITH RULE 42(3) OF THE REVISED RULES OF THE SUPREME COURT

In September, 1976 counsel for ANPA telephoned Timothy H. Fine, Esq., one of the attorneys for Respondents, and requested a stipulation for the filing by ANPA of a brief *amicus curiae* herein. Mr. Fine refused to so stipulate. Mr. Fine was concerned with ANPA's unfamiliarity with the trial record. As discussed *infra,* a reading of ANPA's brief demonstrates that this concern was well-founded.

Rule 42(3) provides:

> 3. When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion for leave to file may timely be presented to the court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five printed pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

The motion filed by the ANPA is not in compliance with Rule 42(3) because said motion does not set forth facts or questions of law that have not already been presented by the parties. Nor does the motion set forth reasons for believing that those issues will not be adequately presented by the parties.

On page 3 of its motion, ANPA lists three issues to which it desires to present its views to the Court:

> "(1) Whether the Court of Appeals erred by interpreting the Court's rationale in *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), as automatically declaring illegal per se all vertical restraints on distribution after title and dominion passes in sales transactions, on which there have been conflicting decisions in both the Courts of Appeals and in the District Courts.
>
> "(2) Whether the Court of Appeals should have applied a Rule of Reason inquiry into the inherent unique characteristics which make the nature, purpose, functions and effects of the independent contractor distribution system of marketing daily

newspapers radically different from the marketing of industrial products.

"(3) Whether the Court of Appeals erred in applying the per se *Schwinn* rule without any consideration or finding that the termination of Respondents' distributorship, the conduct complained of, substantially affected interstate commerce."

The issues presented by ANPA are identical to the first two questions presented in the Petition for Writ of Certiorari, No. 76-86, at page 2:

"(1) Does the fact that a restraint of trade is of a type which is unreasonable *per se* dispense with the necessity that it be either in or affect interstate commerce in order that the Sherman Act apply? The court below held that it did.

"(2) Does the rule of *per se* illegality of territorial restrictions of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) apply to the local distribution of daily newspapers? The court below held that it did."

The most cursory comparison of pages 3-23 of ANPA's brief and pages 8-16 of the Petition for Writ of Certiorari deal with precisely the same questions in the same way. In other words, ANPA's brief contains nothing new. Thus, ANPA's motion and brief are not in compliance with the requirement of Rule 42(3) that a brief *amicus curiae* "set forth facts or questions of law that have not been presented, . . . , by the parties."

In addition, Rule 42(3) requires that if the brief *amicus curiae* deals with the same issues presented by

the parties, then the motion to file the brief must set forth "reasons for believing that they [facts or questions of law] will not be adequately presented by the parties." The motion filed by ANPA contains no assertion that the parties have not adequately dealt with the questions sought to be presented by ANPA. In this respect, ANPA's motion is contrary to the dictates of Rule 42(3).

B. ANPA HAS MISUNDERSTOOD THE CASE IN A MANNER INDICATING ITS UNFAMILIARITY WITH THE TRIAL RECORD

The brief sought to be filed by ANPA indicates a lack of understanding of this case based, no doubt, upon its unfamiliarity with the trial record.

On page 3 of its brief, ANPA states:

"One root error of the Court of Appeals was its failure to note that there was no record evidence from which the jury could have found that there was in fact an express or tacit territorial restriction in the contract between McClatchy and the Nobles."

On pages 4-5 of its brief, ANPA states:

"In *McClatchy*, the Nobles were not restrained from selling the Sacramento Bee to any potential purchaser located outside the designated Newsstand 5 area or who might come into that area."

This shows a complete lack of understanding of the issue of claim two—the termination claim. As pointed out by the Court of Appeals there was sufficient evi-

dence that plaintiffs' refusal to agree to a split of their distributorship (Newsstand No. 5) was a substantial factor in their termination. 533 F.2d at 1090. This evidence is set forth in detail on pages 8 through 11 of the Brief for Respondents in Opposition filed on August 20, 1976 with this Court.

As ANPA knows so well, a territorial "split" by a newspaper publisher is a reduction in the size of the territory served by an independent distributor. Newspaper publishers, as the experts so testified, want to limit their independent distributors from growing too big and earning too much money even if they are doing an excellent job. It's essentially a plantation theory of operation. As ANPA is well aware, in order to be effective, a territorial "split" as a matter of simple logic must involve an understanding, express or tacit, between the distributor and the publisher, that the distributor will confine his sales within the boundaries of his newly created smaller distributorship. Otherwise, the purpose and imposition of the "split" would be nullified. The Nobles repeatedly opposed McClatchy's so-called suggestions to be split and they were then terminated. This is the issue pertaining to vertically imposed territorial restrictions—which is ignored by ANPA.

III.

CONCLUSION

Based on the foregoing, Respondents oppose the motion of the American Newspaper Publishers Association for leave to file brief *amicus curiae*.

Respectfully submitted,

G. JOSEPH BERTAIN, JR.,

TIMOTHY H. FINE,

Attorneys for Respondents.

October 12, 1976.